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OF THE

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AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

NENE VALLEY DRAINAGE COMMISSIONERS *v.* DUNKLEY.

C. A. 1876 M. R. *April* 5, 7. C. A. *Nov.* 6, 7.

[1875 N. 14.]

Vendor and Purchaser—Statute of Frauds—Connected Writings—Plan.

The *N.* Commissioners agreed to sell a property to the Defendant *D.* The contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property:—"Plan of property sold to and purchased by *D.* 23rd Oct., 1874. N.B.—The property included in the purchase is edged with red colour":—

Held, that the plan was sufficiently incorporated, and that the description in the contract was controlled by it.

Statement.

SUIT by vendors for specific performance.

On the 23rd of October, 1874, the Plaintiffs agreed to sell to

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Statement.

the Defendant a property at *Northampton*, which was described in the contract as follows:—

"All that valuable freehold wharf and timber-yard, with a frontage of 183 feet to and adjoining the River *Nene* and the new cattle market, in the town of *Northampton*, and containing by admeasurement 10,200 square feet or thereabouts, together with the workshops, chimneys, sheds, and other outbuildings and appurtenances thereto belonging, and late in the occupation of Mr. *Thomas Baldwin*."

The contract was signed by a Mr. *Savill*, as agent for the Defendant, and by Mr. *Botterell*, the agent of the vendors.

The contract did not refer to any plan, but contemporaneously with its execution Mr. *Savill* and Mr. *Botterell* signed a memorandum written on a plan marked, "Plan of wharf, timber-yard, &c., *Bridge Street, Northampton*, the property of the River *Nene* Commissioners (2nd district). April, 1874."

The memorandum was as follows:—

"Plan of property sold to and purchased by Mr. *Dunkley*, 23rd Oct., 1874. N.B.—The property included in the purchase is edged with red colour.

"*Thomas Savill*, for Mr. *Richard Dunkley*, purchaser.

"*Jas. Botterell*, for the vendors."

The property edged with red on the plan contained 10,200 square feet, and was shewn on the plan, not as adjoining the cattle market, but as lying on the south-east of but not reaching up to a new street leading to the cattle market. It further appeared on the plan that it was separated from the River *Nene* by a towing-path 6 ft. 6 in. wide, and by a narrow strip of land eighteen inches wide lying between the property and the towing-path. This strip the Plaintiffs had retained for the purpose of adding it to the towing-path, which was vested in them for the purposes of the navigation of the River *Nene*, and over which the public had a right of way.

The Defendant's solicitors accepted the title and sent a draft conveyance describing the property as bounded on the north and west sides by the new cattle market, and on the south by the towing-path. The draft also purported to grant a right

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of free passage for the landing and shipping of goods, and other purposes, over the towing-path. The Plaintiffs' solicitors altered the draft by inserting before the words "new cattle market" the words "a road leading to," and by striking out the grant of free passage, which they objected to on the ground that the Defendant would have a right of passage without express words, and that they had no power to grant him any special rights over the towing-path. The Defendant then claimed the whole towing-path, and ultimately refused to complete on the ground of misdescription. The Plaintiffs thereupon filed their bill for specific performance.

Statement.

The case came on for hearing before the Master of the Rolls on the 5th of April, 1876.

Chitty, Q.C., and *Whitehorne*, for the Plaintiffs.

Ince, Q.C., and *Dryden*, for the Defendants.

Judgment, M.R.

JESSEL, M.R., considered it established by the evidence that the Defendant was well acquainted with the property, and perfectly well knew at the time of entering into the contract that the boundary of what he bought was to the edge of the widened towing-path, and knew what was the boundary on the north-west. His Lordship held that there was therefore no misdescription which could mislead the Defendant, and he decreed specific performance. The conveyance to be settled in Chambers if the parties differed.

C. A.

The Defendant appealed, and the appeal came on for hearing on the 6th of November, 1876.

Argument.

Ince, Q.C., and *Dryden*, for the Appellant:—

The contract is to sell a wharf. A wharf means a place where vessels can be unloaded, and the vendors then propose to convey a piece of land not adjoining the river, nor even adjoining the towing-path, but separated from it by a strip of land on which they might build a wall to keep us from the river altogether. The plan is not annexed to the contract, nor referred to in it, and cannot be looked to. The contract itself forms the only agreement within the *Statute of Frauds*.

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Argument.

Chitty, Q.C., and *Whitehorne*, *contrà* :—

The purchaser knew all along that the strip was retained for the purpose of being thrown into the towing-path, so that he will have full convenience for using the property as a wharf. The signed memorandum on the plan sufficiently connects it with the contract to make it a part of the agreement within the *Statute of Frauds*. This plan correctly shews the property which we are ready to convey, and being more particular than the contract, it controls the words of description there employed. Misdescription, therefore, is out of the case.

Ince, in reply.

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I am of opinion, now that the whole matter has been fully brought before us, that the decree of the Master of the Rolls was quite right. I am satisfied that the Defendant knew perfectly well what it was he was buying. I am satisfied that he knew perfectly well that it did not adjoin the cattle market in the sense that it did not actually touch the cattle market. I am satisfied also that he perfectly well knew that the piece of land he was buying did not go down to the water edge of the river *Nene*, and that he was buying through his agent the piece of land as it existed and the wharf and timber-yard there as they had been held by *Thomas Baldwin*, and that he was perfectly aware that there was a strip of land taken out which had reduced the quantity from 10,400 square feet to 10,200 square feet.

I am of opinion that there was a sufficient contract in writing within the *Statute of Frauds* defining that which he meant to buy and which they meant to sell, and that *Savill*, who was his agent to make the contract, was his agent to make it in two parts as well as in one; that is to say, the written contract and the plan with the memorandum upon it. Now, reading the contract with the plan, it appears to me that the subject-matter of the agreement was the wharf as bounded by the red line. That is what the Defendant was intended to have; there was no misdescription, there was no deception, there was no surprise. Those were the defences which were set up before the Master of the Rolls, and which have

been repeated before us; that is to say, "I am entitled to get rid of the contract, for although I accepted the title, I accepted the title to something which I thought was a wharf which had a frontage to the river, but I never accepted the title to what you now offer me, a wharf without such a frontage." I am of opinion that that case entirely fails. Mr. *Dunkley* and his witnesses were examined before the Master of the Rolls, who had an opportunity of hearing their cross-examination and of seeing their demeanour, but they did not impress him with the truthfulness of their story.

One point argued by Mr. *Ince* was: "That strip of ground is not part of the towing-path, and you may build on it or do anything upon that strip of ground, therefore I should not get that which I wanted to get, viz., a wharf." I do not think Mr. *Ince* meant seriously to contend that a wharf, bounded by a towing-path, would not be for all practical purposes a wharf, and a wharf with a frontage to the river along which the towing-path went. That is the usual frontage of wharves by the side of a navigable river where there is a towing-path. Where things have to be towed there is a towing-path, which is a public path, and the wharf goes down to the towing-path. That he knew perfectly well. But then he says: "There is that strip of ground interposed between the towing-path and the wharf, and I am entitled to have special rights given to me over that strip of ground." I think that was an afterthought or difficulty raised in the course of settling the conveyance. What, as it appears to me, was understood between the parties from the first was that that strip of ground was reserved for the purpose of being thrown into the towing-path for the convenience of the public, including the Defendant. If that were thrown into the towing-path, then the Defendant would have what he bargained for, namely, a wharf with a frontage to the river of 182 feet, or what it may be, and all the rights which any other wharfinger along the navigation would have to the use of the towing-path. He says: "I do not get that certainly as a towing-path." As I have said, that seems to me to be an afterthought. When the bill was filed the Plaintiffs said this: "The Defendant knows, and knew all along" (I am satisfied that was so), "as the fact is, that the said strip of land was to be taken into the towing-path when it was widened, and that the said piece of land agreed to be

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NENE VALLEY DRAINAGE COMMISSIONERS v. DUNELEY.

Judgment, C. A. James, L.J.

bought by him adjoined the towing-path as so widened along the whole southern boundary." I am of opinion that the Defendant is entitled to have the contract performed accordingly; that is to say, with the piece of ground thrown into the towing-path so that the towing-path so widened shall be its boundary. I have no doubt that the Master of the Rolls in Chambers would take care so to settle the conveyance as to give effect to that which the Plaintiffs said at first was their intention. I have no objection (it will not make any difference as to costs) to declare that the piece of the wharf is to be thrown into the towing-path and made part thereof. That would give the Defendant all the rights to which he is entitled. If he had said, "Throw that into the towing-path, let it be clear that that towing-path which you have reserved is to be dedicated to the public and to me as part of the public," I am satisfied that the Plaintiffs would have made no objection to doing so. But that was not the real point in contest. The Defendant failed in the real grounds of contention, and the Master of the Rolls rightly thought that under those circumstances he ought to pay the costs of the suit. The decree must therefore stand, and the Defendant will pay the costs of the appeal.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am also of opinion that the decree of the Master of the Rolls should be affirmed. That decree is for specific performance with costs, and with a direction as to preparing a proper conveyance. I have had little doubt throughout the hearing of this appeal as to the propriety of the decree for specific performance. For some time, however, I entertained a doubt whether it should have been with costs as against the Defendant, more particularly as I gathered in the course of the argument that the Master of the Rolls contemplated considering, in settling the conveyance, some of the questions which have been discussed before us, and I felt disposed to think that the question of costs should have been postponed until the conveyance had been settled. I find, however, upon looking more carefully into the pleadings, that the Defendant's case is rested in his answer upon the ground that the contract contains a misdescription sufficient to justify him in refusing to complete. That was the issue which was raised at

the hearing of the cause, and that, as it is shewn there, ought to have been decided against him. I am further of opinion, upon the evidence in this case, that he knew what he was about to purchase, and that he gave authority to purchase that which appeared upon the face of the plan. Therefore I think that, having entirely failed as far as regards the allegation of misdescription, he was properly ordered to pay the costs.

Judgment, C. A. Baggallay, J. A.

I also concur in what has been said by the Lord Justice in reference to the expediency on the present occasion of a declaration being made, or some directions being given, by which it should be placed beyond all question that the piece of land between the towing-path and what forms the yard should form part of the towing-path.

BRAMWELL, J.A. :—

Bramwell, J.A.

I am of the same opinion.

Solicitors: *Oliver & Botterell; J. Whitehouse.*

TRAIL *v.* JACKSON.

[1873 T. 122.]

C. A. 1876 *Nov.* 8.

Practice—Time for Appeal—Refusal of Application—Several Claims joined in one Application—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Where several claims are joined in one application, and some of the claims are allowed and some refused, an appeal from the refusal must be brought within twenty-one days from the date of the refusal, not from the date of perfecting the order.

Statement.

IN this case a summons was taken out in the Chambers of Vice-Chancellor *Hall* by *W. Currey*, claiming "that the applicant may be at liberty to prove for the sum of £75 2*s.* 5*d.*, being the amount of three quarters' rent (less tax) of premises at *Downshire Hill, Hampstead*, due to the applicant, under certain indenture of lease, at Michaelmas, 1875, from the estate of *W. Hitchman*, the testator in the cause; and also for the sum of £260, being the amount of ascertained dilapidations to such premises on the expiration of such lease at the date aforesaid."

C. A. 1876 — TRAIL v. JACKSON. — Statement.

The summons was heard before the Vice-Chancellor on the 2nd of June, 1876, when His Lordship made an order that the applicant be allowed as a creditor against the estate of the testator for the sum of £75 2*s.* 5*d.*, being three quarters' rent due to the applicant under the several leases, dated respectively the 9th of May, 1835, the 7th of August, 1849, and the 29th of September, 1858, at Michaelmas, 1875, and for the further sum of £61, being the ascertained amount of dilapidations in respect of the premises comprised in the said indenture of lease of the 9th of May, 1835; and the Judge did not think fit to make any order as to the sum of £199 claimed for dilapidations in respect of the said leases dated the 7th of August, 1849, and the 29th of September, 1858.

The applicant appealed from this order, asking that it might be "discharged, varied, or set aside."

The order was not drawn up till the 2nd of August. The notice of appeal was given on the 9th of August.

On the appeal being opened,

Argument.

W. Pearson, Q.C., and *Owen*, for the Plaintiff, who was the personal representative of the testator, took the preliminary objection that the appeal was too late. It was an appeal from the refusal of the Judge to make any order on the claim for £199, and in the case of an appeal from the refusal of an application, the twenty-one days limited by Order LVIII., rule 15, of the Rules of Court, 1875, ran from the date of the refusal, not from the date of perfecting the order. The application was for rent and dilapidations in respect of three separate houses, and consisted of several separate claims although they were all included in one summons, and the appeal was only against the refusal of the claims which were disallowed.

Cookson, Q.C., and *Bond*, for *W. Currey*, contended that the rule in question only applied to cases where there was a refusal of the whole of the application, so that there was no occasion to draw up any order: *Smith* v. *Grindley* (1); *Swindell* v. *Birmingham Syndicate* (2). In the present case, the application comprised

(1) 3 Ch. D. 80. (2) 3 Ch. D. 127.

several claims, some of which were rejected and some allowed, therefore it was necessary to draw up the order, and the time for appeal must be calculated from the perfecting of the order. At all events, the construction contended for by the other side was novel and unexpected, and if the Court upheld the objection, they asked for indulgence on the ground of surprise.

C. A. 1876 TRAIL v. JACKSON.

JAMES, L.J.:— Judgment.

I think the objection must prevail. The Appellant is not appealing from anything in the order, but from a refusal by the Judge to give him something which he wished to have inserted in the order. The claims were separate applications although joined in one summons, and some of them were granted and some refused. I think this is an appeal from the refusal of an application within the words of the 15th rule, and the appeal is therefore too late, and must be dismissed with costs.

It cannot be said that there was any surprise in this case, and therefore the Appellant has no ground for indulgence.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

Solicitors: *Sharp & Ullithorne; H. Stirke.*

HOLSTE *v.* ROBERTSON.

C. A. 1876 M. R. *July* 14. C. A. *Nov.* 8.

[1875 H. 179.]

Sealing of Patent—Date of Grant—Foreign Invention patented Abroad—Expiration of Foreign Patent—15 & 16 *Vict. c.* 83, *ss.* 24, 25.

By the *Patent Law Amendment Act* (15 & 16 Vict. c. 83), s. 25, it is enacted that where foreign letters patent are granted for a foreign invention before the grant of a patent for such invention in the United Kingdom, the rights under the English patent shall cease on the determination of the foreign patent. An English patent for a foreign invention was dated the 17th of September, but sealed on the 17th of December, and between the two dates a foreign patent was granted:—

Held (affirming the decision of the Master of the Rolls), that the patent

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must be taken to have been granted on the 17th of September, and therefore that the 25th section was not applicable.

The Court will at any time during the progress of a patent suit allow the Defendant to raise a fresh issue on the discovery of facts which could not with due diligence have been discovered before.

Statement.

THE bill in this case was filed by *Carl Holste* to restrain the Defendants *Henry Robertson* and others from an alleged infringement of the Plaintiff's patent for improvements in blast furnaces.

The Plaintiff applied for his patent, which was for a foreign invention, on the 17th of September, 1867, and filed his provisional specification and obtained provisional protection at the same time.

The letters patent were sealed on the 17th of December, 1867, but were dated the 17th of September, 1867, the day when the application was made.

In the interval, namely, on the 13th of December, 1867, the Plaintiff obtained a patent for the same invention in *Austria*. This foreign patent expired in the year 1870.

The Defendants stated that at the time of their putting in their answer to the suit on the 1st of December, 1875, they were not aware of the facts relating to this foreign patent, and that they had only lately ascertained them, and they applied for leave to put in a supplemental answer in order to raise the defence that, under the provisions of the 25th section of the *Patent Law Amendment Act*, 1852 (1), the English patent expired at the same time with the foreign patent.

The motion came on to be heard before the Master of the Rolls on the 14th of July, 1876.

Chitty, Q.C., and *Millar*, appeared in support of the application.

(1) 15 & 16 Vict. c. 83, s. 25: "Where upon any application made after the passing of this Act letters patent are granted in the *United Kingdom* for or in respect of any invention first invented in any foreign country, or by the subject of any foreign power or state, and a patent or like privilege for the monopoly or exclusive use or exercise of such invention in any foreign country is there obtained before the grant of such letters patent in the *United Kingdom*, all rights and privileges under such letters patent shall (notwithstanding any term in such letters patent limited) cease and be void immediately upon the expiration or other determination of the term during which the patent or like privilege obtained in such foreign country shall continue in force . . ."

Davey, Q.C., and *J. Henderson*, for the Plaintiff. C. A. 1876 HOLSTE v. ROBERTSON.

JESSEL, M.R. :— Judgment, M.R.

I should have had no difficulty in making the order asked for by the Defendant if anything had been discovered since the answer was put in which could not with due diligence have been discovered before. This is done as a matter of course in patent suits. Thus, in *Renard* v. *Levinstein* (1), Vice-Chancellor *Wood* gave leave to the Defendant to add a new issue in the middle of the trial. Here the Defendant says that he has discovered within the last fourteen days that a patent for the same invention as the Plaintiff's was obtained in a foreign country before the grant of the Plaintiff's letters patent.

The 25th section of the *Patent Law Amendment Act* provides that, where letters patent are granted in respect of any invention first invented in any foreign country, and a patent "is there obtained before the grant of such letters patent in the *United Kingdom*, all rights and privileges under such letters patent shall cease and be void immediately upon the expiration or other determination of the term during which the patent obtained in such foreign country shall continue in force." I have no doubt that the word "grant" in this section refers to the date. This appears from the 24th section, which shews that, for the purposes of the Act, the patent is to be read as if sealed on the date which it bears, and is to be taken to be then granted. The motion will therefore be refused with costs.

From this decision the Defendants appealed, and the appeal came on to be heard on the 8th of November, 1876. C. A.

Aston, Q.C., and *Millar* (*Chitty*, Q.C., with them), for the Appellants :— Argument.

The application is for the purpose of raising a defence which goes to the whole right of the Plaintiff, and as we swear that we did not discover it before putting in our answer, the Court ought not

(1) 13 W. R. 229.

C. A. 1876 HOLSTE v. ROBERTSON. Argument.

to refuse us the power to put it in issue. The 25th section of the *Patent Law Amendment Act*, 1852, enacts that when the foreign patent is obtained "before the grant of such letters patent in the *United Kingdom*," all the rights and privileges of the English patent shall cease on the expiration of the foreign patent. The enactment is based upon public policy, in order to encourage inventors to publish their inventions first in *England*, and not in a foreign country.

In the present case the English patent was really granted on the 17th of December, 1867, the date of the sealing; and although it is true that in the 24th section it is provided that "any letters patent issued under this Act as of any day prior to the day of the actual sealing thereof shall have the same force and validity as if they had been sealed on the day as of which the same are expressed to be sealed and bear date," those words cannot affect the question whether the grant was as an actual fact made at the former or the latter date: *In re Winan's Patent* (1); *In re Blake's Patent* (2).

Davey, Q.C., and *J. Henderson*, for the Plaintiff, were not called on.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that there is no ground for this application. The words of the Act of Parliament are clear. The grant of the patent takes effect from the day on which it is dated. The 24th section says that when letters patent are issued as of any day prior to the day of the actual sealing, they shall have the same force and validity as if they had been sealed on the day as of which they are expressed to be sealed. Therefore they must be held to have been granted on that day for all the purposes of the Act. The appeal must be dismissed with costs.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion.

(1) Law Rep. 4 P. C. 93. (2) Law Rep. 4 P. C. 535.

BRAMWELL, J.A.:—

C. A. 1876 HOLSTE v. ROBERTSON.

I am of the same opinion. I wish only to add that in coming to this conclusion I am not at all influenced by the lateness of the application.

Solicitors: *A. H. Miller; Pritchard, Englefield, & Co.*, agents for *E. Storer, Manchester.*

Ex parte AUSTIN. *In re* AUSTIN.

C. A. 1876 *Nov.* 9.

Bankruptcy—Examination of Creditor—Bankruptcy Rules, 1870, *r.* 166.

A debtor became bankrupt in 1872, and in 1875 his assets were found sufficient to pay in full all creditors who had proved, and to leave a considerable surplus, but no dividend had yet been paid. In November, 1875, *G.*, the personal representative of a mortgagee who had obtained in 1869 an absolute order for foreclosure, came in to prove for £21,000, the balance of the mortgage debt, after deducting the estimated value of the property. Supposing this proof admitted, the assets were not sufficient to pay the creditors in full. The trustees, with the sanction of the committee of inspection, made an arrangement with *G.* to admit the proof at £20,000 on the terms that he was to receive nothing till the other creditors had received 18*s.* in the pound, after which he was to receive 18*s.* in the pound, and after this all the creditors, including *G.*, were to rank *pari passu*. The bankrupt then applied for an order to have a private sitting appointed for the examination of *G.*, which was refused by the Registrar sitting as Chief Judge:—

Held, on appeal, that, under the peculiar circumstances of the case, the bankrupt ought to have an opportunity of investigating the claim, and that an order ought to be made for the examination of *G.*

14 C.L.D. 24
23 C.L.D. 12
126
25 C.L.D. 1

Statement.

THIS was an appeal by the bankrupt from a refusal of Mr. Registrar *Murray*, sitting for the Chief Judge, to appoint a private sitting for the examination of *Henry Gibbon* with respect to a proof tendered by him.

Austin was adjudicated a bankrupt on the 19th of July, 1872. He was a *London* builder in a very large way of business, and both his assets and his liabilities were considerable. No dividend had yet been declared owing to the difficulty of realizing a large leasehold property subject to various incumbrances, but it appeared that if a proof tendered on the 6th of November, 1875, by the above-named *Henry Gibbon* was not admitted there would probably be enough to pay all the creditors in full and leave a surplus.

Scanned pt. 8 C.L.D. 438.

C. A. 1876

Ex parte AUSTIN. *In re* AUSTIN.

Statement.

Gibbon was the legal personal representative of *George C. S. Durant*, a mortgagee of part of *Austin's* estate, who had obtained on the 12th of June, 1868, the common foreclosure decree. By certificate, dated the 29th of July, 1868, the sum of £47,211 10*s.* was found due for principal, interest, and costs; and on the 20th of April, 1869, the common order for absolute foreclosure was made. *Durant* died on the 13th of July, 1872, and letters of administration with his will annexed were granted to *Gibbon* on the 13th of June, 1874. On the 6th of November, 1875, *Gibbon* sent in a proof, supported by an affidavit and accounts shewing that £57,015 8*s.* 4*d.* was due from the estate of *Austin* to that of *Durant* on the mortgage, and that the security was estimated at £36,000, leaving a balance of £21,015 8*s.* 4*d.*, for which *Gibbon* sought to prove.

Supposing this proof to be admitted at its full amount, it appeared that the assets, instead of yielding a surplus, would be insufficient to pay the creditors in full.

After much discussion before the Registrar as to this proof, an agreement was ultimately entered into on the 10th of April, 1876, between *Gibbon* and the trustee, which was sanctioned by the committee of inspection. The material terms of this agreement were that *Gibbon's* proof should be admitted at £20,000; that the trustee should release the equity of redemption in the mortgaged property to *Gibbon* in consideration of £36,000, the estimated value; and that *Gibbon* should not claim to be paid any dividend on the amount of his proof until all the other creditors who had proved had received 18*s.* in the pound on their debts, after which *Gibbon* should be entitled to receive a like dividend, after which all the creditors, including *Gibbon*, should receive dividends *pari passu*, provided that nothing in the agreement should prevent or prejudice the rights, powers, and privileges of *Gibbon* as a creditor who had proved. This agreement was approved by a majority of the creditors.

On the 30th of June, 1876, the bankrupt gave notice of motion for an order for a private sitting to be appointed for the examination of *Gibbon*. The application was opposed by the trustee, and Mr. Registrar *Murray* refused it, there being no precedent for making such an order when the trustee opposed. The Registrar

thought that such applications by bankrupts were not to be encouraged, and, moreover, that to grant the order sought would be in fact treating the agreement of the 10th of April, 1876, as a nullity, which he considered that he had no power to do. The bankrupt appealed.

Argument.

De Gex, Q.C., and *Bremner*, for the Appellant:—

This application is made under rule 166 of the Bankruptcy Rules, 1870, the right to apply under which is not confined to the trustee. The principles according to which such powers should be exercised are shewn in *In re Alexander* (1). The Registrar said that such applications by bankrupts were not to be encouraged, and no doubt as a general rule a bankrupt has no *locus standi*, but the present case is exceptional, it being undisputed that if this claim is rejected there will be a large surplus. The creditor seeking to prove has made terms with the other creditors, which make it not worth their while to contest his claim. They make a compromise which is in substance a mere giving up the surplus to the claimant, only a trifling portion being given up by themselves. The bankrupt ought to have an opportunity of contesting the claim, and the Court will not allow such a compromise to stand in the way. The case is eminently one calling for investigation.

Davey, Q.C., and *Yate Lee*, for the trustee:—

The arrangement was made without collusion and *bonâ fide* under the statutory power to effect compromises given by the 27th section of the Act. The creditors, surely, must have a right to settle a claim, instead of contesting it up to the House of Lords, which might suspend the distribution of the estate for years.

[JAMES, L.J.:—The compromise seems to me to be bad on the face of it. It is a compromise at one rate as against the creditors, at another as against the bankrupt.

BRAMWELL, J.A.:—This is not, as in ordinary cases of compromise, a matter of give and take between the parties; it is a compromise at the expense of the bankrupt.]

We say, moreover, that this proceeding is irregular, there being

(1) 1 D. J. & S. 311.

C. A. 1876 *Ex parte* AUSTIN. *In re* AUSTIN.

no proceeding before the Court in support of which the examination can be taken. The bankrupt ought to have proceeded under the 20th section, and then he might properly have asked for this examination as ancillary to his proceedings.

Hemming, Q.C., appeared for *Gibbon*, but it was held that he was not entitled to be heard.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that an order ought to go for the examination of Mr. *Gibbon*. The case is one of the most extraordinary cases I ever heard of—such a case as probably has never before been brought into Court. The creditors have, no doubt, the power of compromising a hostile claim as against themselves—that is, on some one making a doubtful claim, they may agree to admit the claim at a less amount by way of settling the doubt, and such a compromise, no doubt, would be binding. But this is not a compromise of that kind. In the present case, if the proof were rejected there would be a surplus for the debtor. If it were admitted at its full amount the surplus would be absorbed and the dividend payable to the other creditors would be seriously diminished. The creditors whose proofs have been admitted then say, "We will compromise the claim upon terms which will affect us in one way and which will affect the debtor in another way; we will give up all right on the part of ourselves or the debtor to impeach the claim upon the terms that our dividends shall only be slightly reduced, but the debtor shall receive no benefit in any way." That seems to me so very singular a transaction, that I think the debtor has a right to say, "Let me inquire into the circumstances. Let me inquire from the mortgagee what he has been doing with the property, and let me have the means of ascertaining whether he is entitled to make a proof or not." I think the trustee cannot be prejudiced by this. The investigation may be a little annoying or a little inconvenient to Mr. *Gibbon*, just as it is to any other witness who is examined for any other purpose under a bankruptcy; but he will be simply dealt with as a witness. He will be subpœnaed to answer questions with regard to the property, and if it is found that there is no possible good in

disturbing the compromise, the matter will stop there. If otherwise, then proper proceedings will be taken.

Under these circumstances, and having regard to the nature of the compromise, I think the debtor is entitled to have the matter fully investigated.

BAGGALLAY, J.A.:—

Judgment, Baggallay, J.A.

I am of opinion that although the debtor could, if he had thought fit, have availed himself of the provisions of the 20th section by following the mode therein pointed out, it was within the jurisdiction of the Registrar, sitting as Chief Judge, to make an order in accordance with the summons taken out by the debtor in this case, requiring Mr. *Gibbon* to attend for the purpose of being examined. I say I think it was within his jurisdiction to make such an order, but I think the making of the order was discretionary; and if I had felt satisfied, on the materials before us, that the compromise was one clearly within the 27th section of the Act of Parliament, I should have thought that the Registrar had exercised a wise discretion in declining to make an order for the examination; but I am in no way satisfied from what I have heard that the compromise is one which can be supported under that section.

BRAMWELL, J.A.:—

Bramwell, J.A.

I have nothing to add.

Solicitors: *Tilley & Soames; Anderson & Sons.*

C. A.
1876
Nov. 14.

In re BRADFORD TRAMWAYS COMPANY.

Company—Deposit in pursuance of Standing Orders—Application of Deposit—Insolvent Company—Winding up.

6 Ch D. 487.
8 Ch D. 157

By an Act for a public undertaking it was provided that if within a certain time the undertaking should not be completed or half the capital paid up and expended on the work, the deposit made in pursuance of the Standing Orders of the Houses of Parliament should be forfeited to the Crown, or, in the discretion of the Court, if the company was insolvent and had been ordered to be wound up, should wholly or in part be applied as assets of the company for the benefit of the creditors. The company was ordered to be wound up on the ground of inability to pay its debts:—

Held, by *Malins*, V.C., that the deposit ought to be applied in payment of debts and the costs of winding up in priority to any moneys to be received from future calls.

Held, on appeal, that the deposit was to be resorted to so far only as was necessary for paying creditors, and that no order could be made for applying any part of it as assets of the company until it was ascertained in the winding-up that there were debts which could not be paid by means of calls on the shareholders.

Statement.

THIS was an appeal by the Crown from a decision of Vice-Chancellor *Malins* (1) as to the application of a sum of £3000 deposited in pursuance of the Standing Orders of the Houses of Parliament, and which, by sect. 17 of the *Bradford Tramways Act*, was not to be paid out to the promoters unless the company should, previously to the expiration of the period named in the Act for the completion of the tramway, either open the tramway for the public conveyance of passengers, or prove to the satisfaction of the Board of Trade that the company had paid up one half of the share capital and expended for the purposes of the Act an amount equal to such half of the capital; in default of compliance with which conditions the £3000 was to be applied in manner mentioned in the 18th section of the Act.

The facts of the case will be found in the report before the Vice-Chancellor.

Argument.

Rigby, for the Crown:—

The Act says that the fund may be applied for the benefit of

(1) 2 Ch. D. 373.

the creditors of the company. The Vice-Chancellor has decided that it is to be applied in payment of debts in priority to any money received from future calls. This is applying it for the benefit of the shareholders, not of the creditors.

C. A. 1876 *In re* BRADFORD TRAMWAYS COMPANY. Argument.

Higgins, Q.C., and *Bradford*, for the official liquidators:—

The company has been ordered to be wound up on the ground of inability to pay its debts; this is, therefore, a case of insolvency and winding up. The Court will not hold that the power to apply the fund for the benefit of creditors is subject to a condition that all the uncalled-up capital shall be called up and made the primary fund.

J. Pearson, Q.C., and *Maclaren*, appeared for the *Midland Banking Company*.

JAMES, L.J.:— Judgment, James, L.J.

I am of opinion that the order of the Vice-Chancellor in this case cannot be sustained. The money in question is money deposited by promoters in pursuance of the Standing Orders of the Houses of Parliament in order to secure the carrying out of the works which they were applying to Parliament to sanction. The money never was the money of the company, never was the money of the shareholders, and the question is, has it in any way become the money of the shareholders? What the Legislature said is, that if these people, who have obtained authority from Parliament to do certain things, do not within a certain time complete the works or pay up and expend upon the works half the capital, then the money deposited by the promoters is to be forfeited, and it is to be forfeited for the benefit, in the first instance, of the landowners and other persons who are entitled to compensation for injury to their property, and subject to that, it is to be forfeited either for the benefit of the Crown or for the benefit of the creditors of the company; but there is nothing whatever to shew that it was intended to be forfeited for the benefit of the shareholders of the company, and that seems to me to give a clue to the meaning of the Act. The money is to be forfeited, and *primâ fâcie* it is to go to the Crown, but if it is made to

C. A. 1876 — *In re* BRADFORD TRAMWAYS COMPANY. — Judgment, James, L.J.

appear to the Court that there are creditors of the company who are not paid, and whose debts cannot otherwise be paid, then it may, in the discretion of the Court, that is, in the judicial discretion of the Court, be applied, so far as may be necessary, wholly or in part, for satisfying those creditors. It seems to me impossible to draw the line which the Vice-Chancellor has drawn between calls that were made before the winding-up and calls that will be made in the winding-up; they are all equally assets of the company, and are funds primarily and properly applicable to the payment of the creditors and of the costs of the winding-up; and it is only when those assets have been exhausted, or are shewn to be about to be exhausted, in the payment of the debts of the company, that the Court has any jurisdiction whatever to take that which otherwise would be the money of the Crown from the Crown and give it to the liquidator or receiver of the company. I am of opinion, therefore, that the order of the Vice-Chancellor in this case ought to be discharged without prejudice to any application which the liquidators may make to the Court when they can satisfy the Court that they are unable to pay the debts, having used all the assets of the company that they can reasonably get.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion. The order of the Vice-Chancellor can only be supported upon the assumption that it was an exercise of the discretion of the Court within the powers conferred upon the Court by the 18th section of the Act of Parliament; but that discretion can only be exercised in the event of the company being insolvent. As I follow the judgment of the Vice-Chancellor, he seemed to be of opinion in this case that there was evidence that the company was insolvent; and he would appear to have arrived at that conclusion from the allegation that the debts exceeded the amount of assets in the hands of the liquidators, excluding any further calls that might be made upon the shareholders, for I find in his judgment the following words: "The Court is of opinion that the company is to be deemed insolvent when it was ordered to be wound up upon the ground of insolvency, and that the deposit is liable for payment of the debts, including the costs of the winding-up, in priority to any moneys received from

calls made or to be made subsequently to the winding-up." As the Lord Justice has already observed, I cannot see any distinction between calls made prior to and those which may be made after the winding-up, so far as regards their liability to the payment of the debts of the company. It appears to me, having a due regard to the provisions of the 18th section, that recourse can only be had to the fund in question for the benefit of the creditors, and not for the benefit of the shareholders in the company.

BRAMWELL, J.A.:—

I am entirely of the same opinion. The scheme of the 17th and 18th sections is that the promoters who deposit this money, and who are the originators of an abortive scheme, shall, if the scheme proves abortive, forfeit the deposit money, shall never get it back, nor get the benefit of it in any way. Now, it is not forfeited strictly for the benefit of the Crown; the Crown has not any meritorious claim, but takes it as a sort of vacant property that must go to somebody, just as it takes a fine; but then, if there are unhappily creditors who cannot get paid out of the assets of the company, the Crown's right to the fund (the Crown having, as I said, no particular meritorious claim to it) may be put on one side for the benefit of those creditors who otherwise would remain unpaid, and who are not guilty or responsible; but the promoters, as I have said, are not to get it, nor are the shareholders, who have done nothing to deserve it. It is all very well to talk of them as innocent persons, but they have trusted parties who have brought forward an abortive scheme. That being, to my mind, most clearly the scope and intention of the Act of Parliament, that is to say, that the promoters in the case supposed should not have the deposit, and that the Crown should take it if there is nobody else to take it (I leave out the payment of the compensation to landowners entitled), but that the creditors should take it, if there are creditors who would otherwise be unpaid, it is manifest to my mind that it never was intended that it should under any circumstances be applied for the benefit of the shareholders. If it were to be so applied, this ludicrous consequence would follow: Suppose the shareholders had paid but very little upon their shares, which is perfectly possible,

C. A. 1876 — *In re* BRADFORD TRAMWAYS COMPANY. — Judgment, Bramwell, J.A.

and suppose the debts of the company to be much less than the deposit money, the result would be that the liquidators might have to make a dividend to the shareholders out of the forfeited deposit to an amount exceeding what they had paid on their shares. Now, the intention of the Act of Parliament and the consequences of applying the deposit for the benefit of the shareholders being such as I have mentioned, it is clear to me that this company is not insolvent within the meaning of this sect. 18. If the insolvency intended by the Act were what Mr. *Higgins* contends, not an inability to pay, not a want of funds wherewith to pay if the company chooses to collect them, but a not paying, it seems to me that the word might as well have been left out of the clause; because when a company is ordered to be wound up it is necessarily in that condition. It seems to me, therefore, that this company is not insolvent within the meaning of this clause. But assuming it to be insolvent, I think, with great submission to the learned Vice-Chancellor, that he should not have made an order having the effect of applying this forfeited sum of money to the creditors of the company until it had been ascertained, from inability to realize the assets of the company, that there was a necessity for so doing. That has not been ascertained. For aught we know, it may turn out that the shareholders of the company are solvent, and will pay up enough to satisfy all the creditors; and in that case, in my opinion, there would be no power and no right upon the part of the Court to divert any of the money from the Crown.

Solicitors: *Raven & Hare; Walter Webb; Ashurst, Morris, & Co.*

Ex parte LEMAN. *In re* BARRAND.

C. A. 1876 Nov. 16.

Bill of Sale—Registration—First Bill of Sale not registered—Second Bill of Sale registered—Bankruptcy of Mortgagor—Rights of Trustee—Bills of Sale Act, 1854, *s.* 1.

A bill of sale of chattels was executed but not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition:—

Held (affirming the decision of the Chief Judge), that the second mortgagee was entitled to such of the chattels as had not been seized by the first mortgagee before the liquidation.

Statement.

THIS was an appeal by the trustee in liquidation of *Barrand* from a decision of the Chief Judge in Bankruptcy (1).

Argument.

De Gex, Q.C., and *Finlay Knight*, for the trustee:—

The statute does not say that an unregistered bill of sale shall be void generally; it only makes it void as against certain persons, of whom the holder of a subsequent bill of sale is not one. The decision in substance imports into the Act that an unregistered bill of sale shall be void as against a subsequent duly registered bill of sale. If the Legislature had intended that, it would have said so. In *Richards* v. *James* (2), which was relied on against us, the property could only be recovered from the execution creditors by virtue of the registered bill of sale, and it would have been absurd to hold that the holder of that bill of sale recovered for the benefit of the holder of the other. Here the trustee recovered by the strength of his own title, and it ought not to be held that he recovered for the benefit of somebody else, who could not have taken the property from *Collins*.

Winslow, Q.C., and *Kisch*, in support of the order, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

In my opinion we have nothing to do with any questions between the first and second mortgagees. The only parties to the

(1) 3 Ch. D. 324, where the facts will be found.
(2) Law Rep. 2 Q. B. 285.

C. A. 1876 *Ex parte* LEMAN. *In re* BARRAND. Judgment.

contention before us are the trustee and a person to whom the debtor, whom the trustee represents, assigned these goods by a bill of sale duly registered. By that assignment the goods were made the property of the assignee, and there is nothing in the *Bills of Sale Act* to take away his right. But for the decision of the County Court Judge, I should not have thought the question arguable.

Baggallay, J.A. BAGGALLAY, J.A., concurred.

Bramwell, J.A. BRAMWELL, J.A. :—

The argument of the trustee amounts to this: You, the second mortgagee, would have had a perfectly good title against me, were it not that there is another person who has no title against me. The existence of that person takes away your right as against me.

Solicitors: *J. Seymour Kisch ; Taylor, Hoare, & Co.*

C. A. 1876 *Nov.* 10, 13, 14, 17, 18, 20.

BIGSBY *v.* DICKINSON.

[1875 B. 302.]

Appeal on Matter of Fact—Rebutting Evidence—Duty of Court of Appeal—Admission of fresh Evidence—Costs of Printing Evidence—Rules of Court, 1875, *Order* LVIII., *r.* 12.

Although the Court of Appeal, when called on to review the conclusion of a Judge of first instance after hearing witnesses *vivâ voce*, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will in a proper case act upon its own view of conflicting evidence.

Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he think right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal.

Where the *vivâ voce* evidence is voluminous, and the parties cannot properly argue the appeal without referring to all parts of it, the Court will allow the costs of printing it.

Statement. THE bill in this case was filed by *W. T. Bigsby*, to restrain the Defendant *A. J. Dickinson*, who was a manufacturer of tar, sulphate

of ammonia, and anthracene, in *Trundley's Lane, Deptford*, from manufacturing those substances in such manner as to cause a nuisance to the Plaintiff or the inmates of his house.

The Plaintiff was a varnish manufacturer, carrying on his business in some of the arches of the *London and Greenwich Railway*, near *Trundley's Lane*, and the Defendant's works were carried on in the immediate neighbourhood. The Plaintiff complained that noxious fumes and poisonous gases, especially sulphureted hydrogen, were evolved from the Defendant's works, which destroyed his plants and vegetables, and injured the health of himself and his family.

The Defendant's case was that, although at one time sulphureted hydrogen and other vapours were evolved from his works, this had been rendered impossible before the filing of the bill by the alterations in his machinery and mode of working, which were completed in May, 1875; secondly, that if since that time the Plaintiff had experienced annoyance, it might have been from other chemical works in the neighbourhood; and, thirdly, that the Plaintiff himself, in his manufacture of varnish, used materials which evolved sulphureted hydrogen and other noxious fumes, so that, in fact, he himself caused the nuisance of which he complained.

A great number of witnesses on both sides were examined in Court before the Vice-Chancellor, and His Lordship, being satisfied that the Plaintiff used mineral asphaltum in the manufacture of *Japan* black in his works, which substance gives out sulphureted hydrogen, was of opinion that the noxious fumes proceeded from the Plaintiff's own works and not from the Defendant's, and dismissed the bill with costs. The Plaintiff appealed from this decision.

The evidence on which the Vice-Chancellor formed his opinion as to the noxious nature of the materials used by the Plaintiff was given by one of the scientific witnesses towards the close of the Defendant's case, and is particularly referred to in the judgment of Lord Justice *James*. The Plaintiff, in his reply, asked for an opportunity of bringing fresh evidence to rebut this case by shewing that he used no mineral asphaltum in his works; but the Vice-Chancellor considered that the application was made too late, and refused to allow any fresh evidence to be adduced.

C. A. 1876

BIGSBY v. DICKINSON.

Statement.

The Plaintiff employed a shorthand writer to take notes of the *vivâ voce* evidence, which was very voluminous, the examination of witnesses having extended over six days, and had the notes printed.

When the appeal was opened, the counsel for the Defendant objected to the use of the printed evidence, the correctness of which had not been verified. It was, however, eventually agreed that the printed evidence should be taken as correct and used on the appeal without prejudice to the question by whom the cost of printing ought to be borne.

Argument.

Karslake, Q.C., and *Seeley*, for the Plaintiff, asked leave to give further evidence as to the materials used by the Plaintiff in the manufacture of *Brunswick* black and black japan, in order to shew that he never used mineral asphaltum or any other material from which sulphureted hydrogen was evolved. They contended that they were taken by surprise by the evidence on that subject before the Vice-Chancellor, and ought now to have an opportunity of explaining that it was all a misapprehension.

Kay, Q.C., and *Dauney*, for the Defendant, objected to the admission of fresh evidence after so full an investigation of the facts had taken place in the Court below.

The Court allowed the Plaintiff to adduce fresh evidence upon the grounds stated by their Lordships in their final judgments, and witnesses were accordingly examined, who swore that the asphalte used by the Plaintiff was not mineral asphaltum, but a gum which evolved no sulphureted hydrogen or other noxious vapour.

The appeal was then heard upon the old and new evidence.

Judgment, James, L.J.

Nov. 20. JAMES, L.J.:—

In this case the Appellant's counsel, in opening the appeal, asked leave to put in further evidence, and we thought it right to grant such leave. The application was made and granted under the following circumstances:—The suit being a suit to restrain a nuisance by the Defendant, it was suggested on his behalf that the

nuisance was occasioned, or to a great extent occasioned, by the Plaintiff's own manufacture. The Plaintiff is a varnish-maker. He gave general evidence that his manufacture did not produce any such nuisance. Among the witnesses he called was one *Dopson*, who, in examination, stated that the Plaintiff, among other varnishes, made *Brunswick* black and *Japan* black; but in answer to further questions, stated that they were made from a soft gum, and that he had never seen any asphalte on the premises. In the course of the Defendant's case, a scientific witness read and verified from technological works a statement that *Brunswick* black and black japan are made by mixing any foreign asphaltum, except Egyptian, with other ingredients, and proved that foreign asphaltum gives out sulphureted hydrogen, which is the material, the principal subject of the nuisance complained of. He made an experiment with this asphaltum in the presence of the Court. No question whatever had been put to the Plaintiff or to any of his witnesses, except *Dopson*, about the *Brunswick* black or black japan, or what he made it of, or in what quantities: and nothing was said to lay a foundation for the contradiction of his evidence, to be inferred or deduced from the statement of the scientific witness. On the close of the Defendant's evidence the Plaintiff and other witnesses were recalled as to another matter, but no question was asked with reference to the manufacture of *Brunswick* black or *Japan* black. The counsel for the Defendant contended, on the evidence of *Dopson* and the scientific evidence, that he had made out that the Plaintiff's manufacture did give out the noxious vapours, and further, that the Plaintiff had been guilty of a most dishonest attempt to deceive the Court by suppressing the fact that he was making such varnish, the manufacture of which produced such vapours. At the close of his speech the counsel for the Plaintiff applied to shew that the whole of this was upon a mere misapprehension and mistake; that there were two kinds of asphaltum, well known in the market and to all makers and dealers—one a mineral asphaltum, which did give out noxious vapours, and one a vegetable asphaltum, which did not, and which would, in fact, answer *Dopson's* description of a gum, and which was the one used. This was undoubtedly a very late period at which to apply to give further evidence. The Vice-Chancellor

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thought it was absolutely too late, and that he was precluded from admitting it. Considering, however, how this part of the case had been launched by the Defendant—that the Plaintiff was to be convicted of dishonest suppression of the truth and his evidence discredited on the mere inference that his *Brunswick* black was made in the same manner and from the same materials as stated in the books, and that no question had been put to him as ought always to be put to a witness who is intended to be contradicted and discredited; and considering, further, what the evidence was which he proposed to give, we were of opinion that he ought to have had the opportunity he asked. It was not evidence of something which could have been invented or fabricated during counsel's speech to meet the pinch of the case. The main fact sought to be proved was, if true, known to all the persons in *London* connected with the trade, viz., that there was such a thing as vegetable asphaltum, and that such asphaltum was used in making the varnish. It was to get rid of a misapprehension arising from two very different things being known by the same name. And at no period of a cause is it too late to shew that confusion and error have arisen from two persons, or two plans, or two things passing by the same name, and more especially to shew that through such confusion the Court had been deceived by a misleading experiment performed in its own presence. We, therefore, admitted the evidence, which proved to be absolutely conclusive, and to entirely exonerate the Plaintiff from the very serious charge which was thought by the counsel for the Defendant and by the Vice-Chancellor to have been established against him. And the result shewed that if that evidence had been excluded the case on that point would not have been decided according to the truth of the facts, but according to the mode in which the case had been forensically conducted.

We were very much pressed not to disturb the finding of the Vice-Chancellor on a matter of conflicting evidence. With respect to the great weight that is due to the decision of a Judge of first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat, and adhere to, what we said in

the case of *The Glannibanta* (1). Of course, if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened. But then, that would be in truth to do away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in those cases than in any other.

Judgment, James, L.J.

[His Lordship then briefly considered the facts of the case as established in evidence, and held that the Plaintiff had completely made out his case to relief, and that he was entitled to a perpetual injunction against the continuance of the nuisance complained of arising from the works of the Defendant. The decision of the Vice-Chancellor was therefore reversed.]

BAGGALLAY, J.A.:—

Baggallay, J. A.

If this appeal were to be disposed of on the same evidence as before the Vice-Chancellor, I should feel very great hesitation in arriving at a different conclusion from that at which he arrived. I also think that, having regard to the course pursued by the parties at the hearing of the cause—the course pursued as well by the Plaintiff as by the Defendant—neither of them had any right or title to ask of the Court to have a further examination of the Plaintiff or of any of the other persons who have given evidence on his side. But it appears to me that this is exactly the case in which it was, I will not say the duty, but the right of the Court to require that a further witness or further witnesses should be called. It appeared that one part of the case, namely, the possi-

(1) 1 P. D. p. 287. "Now we feel as strongly as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of the first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

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bility of the injuries which the Plaintiff had sustained having been caused by operations going on upon his own premises, had not been sufficiently and completely dealt with by either of the parties to the cause. That further evidence has been admitted by this Court, and, I think, rightly admitted; and it appears to me, now that we have that further evidence before us, that it is beyond all question that the Plaintiff has sustained his case in this Court, and that he is entitled to the injunction which he asks.

Bramwell, J.A. BRAMWELL, J.A.:—

I think it right in this case, differing as I do from the conclusion to which the Vice-Chancellor came upon the materials before him, to give my reasons at length for the conclusion to which I have come, although I do not know that I shall add much to what has been said before, but I think it is better to shew that I have formed an absolutely independent opinion upon a matter of this description than that I have adopted merely the opinion of my colleagues.

Now we were warned by Mr. *Kay*, reasonably enough, that we ought not to treat this as a new matter; that we ought not to reverse the judgment of the Vice-Chancellor unless we are satisfied that he was wrong. In that I entirely agree. We were also warned that the burden of proof was upon the Plaintiff, and that, therefore, we had to consider whether he had made out a case, and made out that the Vice-Chancellor was wrong, and in that I agree. We were also reminded by him that the Vice-Chancellor had had the advantage of the living witnesses before him, whereas we only had their evidence upon paper, without the opportunity of seeing and judging of them and their demeanour. And that is true, and it is a thing that ought to be particularly impressed upon us at this moment, when we know that the Legislature has made a change in the mode of giving evidence in these Courts, which may be said to have succeeded to the business of the Equity Courts, by directing that as a rule it shall be *vivâ voce*, and not in writing—a most excellent provision, in my judgment. Now these three things were all put before us by Mr. *Kay*. There is a general observation not exactly in answer to that, but an observation which might be made on the other side, which is this, that

the Legislature has contemplated and made provision for our reversing a judgment of a Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the Plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as those that have been presented to us from reversing a decision from which we dissent, it would have been better at once to say that in such cases there should be no appeal.

Two particular observations in addition, I think, this case gives rise to, one of which has been mentioned by the Lord Justice, and that is this, that, in my judgment, there has been no great difference in the testimony of the witnesses. This is not a case in which one has reason to suppose that the witnesses are giving dishonest evidence—no doubt their judgments are biased and prejudiced to a considerable extent—but it is not a case in which there is reason to suppose the witnesses on one side or the other are giving dishonest evidence. Another particular observation that I desire to make in the case is this, that I feel satisfied—and I need not say I say it with perfect respect—that I can put my finger upon the error, or the mistake, which the Vice-Chancellor made, and I am satisfied that if he had had those materials before him which we now have, he would not have made the mistake, if, indeed, it can properly be said to have been a mistake of his making. [His Lordship then considered the evidence which had been adduced and concluded as follows:—]

I really do not scruple to say—I say it with the greatest and most sincere respect for the learned Vice-Chancellor—seeing what, in my judgment, it was which caused him to come to the conclusion which he has, and believing he would have come to a different one if he had had the materials before him which we have—I say, in my judgment, the Plaintiff has made out a very strong case indeed, which has met with no answer on the part of the Defendant, and that the Plaintiff is entitled to our judgment.

Karslake, Q.C., applied for the costs of taking and printing the shorthand notes of the evidence before the Lord Chancellor. He referred to the Rules of Court, 1875, Order LVIII., rule 12, which

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gives the Court a discretion as to allowing the costs of printing evidence when this is done by either party.

Kay, Q.C., for the Defendant, said that the Plaintiff had the evidence printed at his own risk, and the Defendant had no opportunity of correcting the notes. The 11th rule of the Order referred to made the Judge's notes the authentic record of the *vivâ voce* evidence. At all events, it was not necessary to print the whole of the evidence.

JAMES, L.J. :—

On the whole, Mr. *Karslake*, I think you are entitled to have these costs. In this case it is clear we could not have got on without the evidence. It is a case in which there could be no selection of any particular part of the evidence. Both sides have been obliged to read almost the whole of the evidence, both in chief and cross-examination, and I think the Plaintiff is entitled to the costs of the whole.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

Dec. 20. The case was mentioned again this day, when it was stated that the Taxing Master refused to allow the costs of taking the shorthand notes, and making the transcript.

Karslake, Q.C., stated that the transcript was not made for the use of counsel during the argument before the Vice-Chancellor, but was made after the conclusion of the case, solely for the purpose of printing with a view to the appeal.

THE COURT on that understanding allowed the costs of making the transcript, but not the costs of taking the notes by the shorthand writer.

Solicitors: *Paterson, Sons, & Garner; W. Beck.*

In re EUROPEAN CENTRAL RAILWAY COMPANY. *Ex parte* ORIENTAL FINANCIAL CORPORATION.

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Winding-up—Proof—Interest on Judgment Debt—Interest on Debenture—1 & 2 *Vict. c.* 110, *s.* 17.

A railway company, in the year 1864, issued debentures by which they bound themselves to pay a principal sum one year after the date of issue, with interest at 6 per cent., and charged the railway and undertaking with the payment of the principal sum and interest.

Soon after the expiration of the year a debenture holder brought an action against the company, and recovered judgment for the principal debt, interest, and costs. The company was ordered to be wound up in 1868, and the debenture holder was admitted to prove for the judgment debt and interest at 4 per cent. The debenture holder claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment:—

Held (affirming the decision of *Bacon*, V.C.), that the original debt was merged in the judgment, and that the claimant was only entitled to interest on the judgment at 4 per cent.

Statement.

THE question in this case arose in the winding-up of the *European Central Railway Company, Limited.*

In October, 1864, the *European Central Railway Company* issued twenty debentures of £1000 each to Mr. *H. A. Holden*, in part payment of the contract price of certain works which he was to execute for them. By each of these debentures, which were dated the 11th of October, 1864, the company bound themselves, their successors and assigns, to pay to *H. A. Holden* the sum of £1000, together with interest for the same at the rate of £6 per cent. per annum, the principal sum to be paid on the 11th day of October, 1865, and the interest to be payable in the meantime half yearly at the several dates expressed in the interest warrants thereunto annexed, until the repayment thereof; and for further securing payment of such principal and interest, the said company thereby charged the said railway and undertaking, and the works, lands, and hereditaments of the said company, and all the capital, estate, right, title, and interest of the company therein, with the repayment to *Holden*, his executors, administrators, and assigns, of the said principal sum of £1000 and interest.

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Statement.

By an indenture dated the 2nd of November, 1864, *Holden* assigned these debentures to the *Oriental Financial Corporation.*

The debentures were not paid at maturity, and the *Oriental Financial Corporation* brought an action in the name of *Holden* against the *European Central Railway Company*, and on the 25th of November, 1865, recovered judgment against them on the debentures for the principal sum, interest, and costs, amounting to £20,636 8*s.* 4*d.*

The *European Central Railway Company* was ordered to be wound up on the 20th of January, 1868. The *Oriental Financial Corporation* was also being wound up voluntarily. They were admitted to prove against the assets of the *European Central Railway Company* for the amount of their judgment debt and £1747 18*s.* 6*d.* for interest thereon at 4 per cent. down to the date of the winding-up order; but they also claimed to prove for £861 10*s.* 9*d.* for additional interest at 2 per cent. on £20,000 from the 25th of November, 1865.

A summons was accordingly taken out to that effect before Vice-Chancellor *Bacon*, and came on to be heard before the Vice-Chancellor on the 15th of July, 1876.

Argument.

Kay, Q.C., and *Jason Smith*, for the liquidators of the *Oriental Financial Corporation*, relied on the same cases as they cited in the Court of Appeal, and particularly on *In re Agriculturist Cattle Insurance Company, Ex parte Hughes* (1).

(1) 1872. Jan. 26. L. JJ.

In re AGRICULTURIST CATTLE INSURANCE COMPANY. *Ex parte* HUGHES.

IN the year 1859 Mr. *T. Hughes* commenced an action in the Court of Common Pleas against the *Agriculturist Cattle Insurance Company* for the sum of £3273 13*s.* 11*d.*, with interest on £3000, part thereof, at the rate of 6 per cent., which sum of £3000 was secured to Mr. *Hughes* by a promissory note of the company.

An agreement was subsequently come to between the company and Mr. *Hughes* that the company should give him judgment in the action for £3536 0*s.* 11*d.*, and £1 10*s.* costs, and that the loan of the said sum of £3000 should continue, and that the judgment should not be enforced for two years, unless the company made default in payment of interest, and that the judgment should stand as collateral security for the sum of £3000 and interest. The judgment was not signed till the 17th of April, 1861.

The company was wound up by an order dated the 20th of April, 1861, and Mr. *Hughes* claimed in the winding-up to be paid his debt of £3000, with interest at 6 per cent.

The Master of the Rolls (Lord

Sir *H. Jackson*, Q.C., and *Bardswell*, for the official liquidator of the *European Central Railway Company*.

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Kay, in reply.

Judgment. V.-C. B.

BACON, V.C.:—

I should not have hesitated but for the decision of the Lords Justices in *In re Agriculturist Cattle Insurance Company* (1), which has been referred to. Before the statute the Court resorted to a variety of expedients in order to do what it thought just between parties. Then came the statute of the 1 & 2 Vict. c. 110, which to my mind has put the matter beyond reasonable doubt. The debt under the mortgage merges in the debt under the judgment. The case is governed by the statute, and I repeat that I should not have hesitated a moment but for the authority which has been mentioned. However, on considering the decision there made it will be perceived that it proceeded upon the ground of a special agreement, the like of which does not exist in the case before me.

The summons must be refused, but, under the circumstances, without costs.

From this decision the *Oriental Financial Corporation* appealed. The appeal was heard on the 12th of November, 1876.

C. A.

Kay, Q.C., and *Jason Smith*, for the Appellants:—

Argument.

Interest at the rate stipulated for in a mortgage or bond is constantly given in an action at law by way of damages: *Dickenson* v. *Harrison* (2); *Price* v. *Great Western Railway Company* (3);

Romilly) held that Mr. *Hughes* was only entitled to the principal sum claimed, with interest at 4 per cent.

Mr. *Hughes* appealed from this decision.

Roxburgh, Q.C., and *Millar*, for the Appellants.

Lindley, Q.C., for the executors of *T. Houldsworth*, a contributory.

C. T. Simpson, for the official manager of the company.

The LORDS JUSTICES held that Mr. *Hughes* was entitled to have interest on the sum of £3000 at 6 per cent. from the 17th of April, 1861.

(1) *Ante*, p. 34, n.

(2) 4 Price, 282.

(3) 16 M. & W. 244.

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Ashwell v. *Staunton* (1); *Lind* v. *Donegall* (2); *McClure* v. *Dunkin* (3); *Morgan* v. *Evans* (4). The 17th section of the 1 & 2 Vict. c. 110 does not take away the right of a creditor who has bargained for a higher rate of interest than 4 per cent. to recover that rate by way of damages. It only applies to cases where there is no special agreement as to interest. But we also rely on the right which every mortgagee has to pursue all his remedies; and the fact of our having obtained judgment at law does not take away our right to hold our charge on the railway until we have received our principal and interest at the rate for which we contracted, namely, 6 per cent. If otherwise, we shall be in a worse position than if we had not obtained judgment, and it will be a great hardship if we are made to suffer for our diligence. The case cited in the Court below, *In re Agriculturist Cattle Insurance Company* (5), is strictly in point.

Sir *H. Jackson*, Q.C., and *Bardswell*, for the official liquidator of the *European Central Railway Company*:—

The facts in *In re Agriculturist Cattle Insurance Company* were different from those in the present case. There was a special agreement for the continuance of the loan, and the judgment was only given as a collateral security. That was not the case here, and, therefore, there was nothing to prevent the application of the ordinary rule, that the debt merges in the judgment: *Florence* v. *Jenings* (6). It is true that in the case of a mortgage the mortgagee may pursue all his remedies, but if a mortgagee who is entitled to 6 per cent. obtains judgment in an action for the principal sum and interest, and then some years afterwards files a bill for foreclosure, he would only be allowed 4 per cent. after the date of the judgment. There is no hardship on the Appellants. They brought the action to secure the advantage of an execution, and if the winding-up had followed immediately on the judgment, they would have reaped an advantage from it.

[Baggallay, J.A., referred to *Clarke* v. *Lord Abingdon* (7).]

(1) 30 Beav. 52.
(2) Ll. & G. t. Plunk. 227.
(3) 1 East, 436.
(4) 3 Cl. & F. 159.
(5) *Ante*, p. 34, n.
(6) 2 C. B. (N.S.) 454, 466.
(7) 17 Ves. 106.

Jason Smith, in reply.

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Nov. 25. BRAMWELL, J.A., delivered the judgment of the Court (*James*, L.J., *Baggallay*, J.A., and *Bramwell*, J.A.), as follows:—

We are all of opinion that the order of the Vice-Chancellor is right, and ought to be affirmed. Each of the instruments upon which the Appellants found their claim states that the *European Central Railway Company* bind themselves, their successors and assigns, to pay to *Holden*, his executors and assigns, the sum of £1000, with interest at 6 per cent. per annum, the principal to be paid on the 11th of October, 1865, and the interest to be payable in the meantime half yearly, at the several dates expressed in the interest warrants thereunto annexed, until the repayment thereof; and for further securing the payment of such principal and interest the company thereby charge their railway and undertaking, and all the works, lands, and hereditaments of the company, with the repayment of the same sum and interest. All that the company bound themselves to pay by that instrument was the sum of £1000 and £60 for interest by two instalments, on or before the 11th of October, 1865. There is no fresh contract evidenced by the forbearance of the creditors, or in any other way, for the payment of any further interest. The creditors brought their action, and on the 25th of November, 1865, recovered judgment on their twenty bonds for the principal sum and half a year's interest, together with a small sum by way of damages for the detention of the debt after the 11th of October, 1865, and costs, in all £20,636 8*s.* 4*d.* From that time forth that sum, by virtue of the *Judgment Act*, carried interest at 4 per cent. per annum. From that time that became the sole debt from the obligors to the Appellants. They were entitled to enforce payment by execution of that sum, with interest at 4 per cent., and they could enforce nothing more. There was no process by which they could get from the obligors any more than that sum and interest at 4 per cent.; that was the sole debt between the parties.

Now, it is contended that, although there is no debt, the Appellants are entitled to something different by virtue of the clause in the debenture, by which the railway and undertaking are charged

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with the principal sum and interest at 6 per cent. If no action had been brought the Appellants might have been entitled to prove for 5 per cent., or perhaps even 6 per cent. by way of damages. But although they have got their judgment, they still claim for the further interest of 2 per cent. by virtue of their charge. It seems to us only necessary to state their claims to shew that they cannot have that right. Because by the debenture the undertaking in terms is only charged with £1000 and one sum of £60 for interest, and though if nothing had happened not only the sums charged but damages for their non-payment might be claimed, here the original debt is gone, *transit in rem judicatam*, a fresh debt is created with different consequences. The judgment is now the charge. There cannot be two debts, one leviable by execution, the other charging the undertaking. There cannot be a charge for more than is due. It is said that it is a hardship upon the Appellants, because they are worse off by reason of their diligence in bringing the action. But they were not compelled to bring the action; they brought it in order to obtain the advantage of an execution. If, therefore, there has been any hardship, it was not inflicted upon them by the law so as to make us doubt whether the law could be so.

A case has been cited in which Mr. *Hughes* was held entitled to 6 per cent. after obtaining judgment against the *Agriculturist Cattle Insurance Company*. But in that case there was a special agreement between the parties that the loan which carried interest at 6 per cent. should continue; there is no such special agreement here. There is no other agreement than that which has been converted into a judgment; there is no other debt or obligation affecting them. It is, therefore, our opinion that the appeal should be dismissed with costs.

Solicitor for Appellants: *S. J. Robinson.*
Solicitors for Respondents: *Farmer & Robins.*

Ex parte ADAMS.

M. R.
1876
Nov. 2.

Solicitor—Articled Clerk—Service under Articles—Interruption of Service—Completion of Term after Articles had expired—6 & 7 Vict. c. 73, s. 3.

In September, 1870, *A.* was articled to his father, an attorney, for five years, and served till October, 1873, when his father by an indenture assigned his services to *D.* for fifteen months, after which *A.* returned to his father and served under the original articles till September, 1875. The Court of Queen's Bench having held that the service under the assignment could not be reckoned as part of the five years' service, *A.* continued to serve with his father for another fifteen months, but without fresh articles:—

Held, that *A.* had not duly served under the contract within the meaning of 6 & 7 Vict. c. 73, s. 3, and that he must complete his five years' service under fresh articles for fifteen months, but that, under the circumstances, he might be allowed to go in for his examination.

Statement.

THIS was an application on behalf of *A. E. Adams*, that he might be admitted to pass his examination by the *Incorporated Law Society* with a view to his being admitted as a solicitor, under the following circumstances:—

The applicant was, on the 6th of September, 1870, duly articled to his father, *H. C. Adams*, an attorney, for the statutory term of five years. He served under these articles continuously up to the 2nd of October, 1873, when, by an indenture of assignment, *H. C. Adams*, at the request of the applicant (who was a party to the deed) assigned all the right, title, interest, duty, service, and demand which he had in or to the applicant to *T. M. Dalton*, an attorney, for fifteen months from that date. The applicant then served *Dalton* as such clerk up to the expiration of the fifteen months, when he returned to the service of *H. C. Adams*, and continued to serve him under the original articles for the remainder of the five years to the 6th of September, 1875. The applicant then applied to the Court of Queen's Bench that the period of fifteen months during which he had served under the assignment of his articles to *Dalton* might be reckoned as part of the five years served under the original articles, but the Court refused the application, and held that he had not, to the extent of the fifteen months, fulfilled the conditions of the statute (6 & 7 Vict. c. 73), ss. 6, 12.(1)

(1) See *Ex parte Adams*, 46 10 Q.B. 227.

M. R. 1876 *Ex parte* ADAMS.

The applicant then returned to his father's service, but without fresh articles, and he now, on the completion of another fifteen months' continuous service, applied to be admitted to examination.

Argument.

C. H. Turner, in support of the application:—

The conditions of the statute have in this case been sufficiently complied with. The applicant has served five years under his father, and, though he did not enter into fresh articles, that was unnecessary, because his services must be taken to have been under the original articles, notwithstanding their having expired on the 6th of September, 1875.

In *Ex parte Moses* (1), where an articled clerk had been absent through illness during eleven months of the term of five years for which he was articled, although the Court refused to recognise the period of his absence as part of his term, yet *Blackburn*, J., said that he must serve "under the same or fresh articles so as to complete his five years." Here, I submit that the additional service under the same articles is sufficient.

Judgment.

JESSEL, M.R.:—

I am prohibited by sect. 3 of the statute from admitting the applicant unless he "shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in *England* or *Wales*, and shall have duly served under such contract for and during the said term of five years." Here there is no question that he has duly served during the required term, but the last part of the time the service has not been under the written contract. The applicant may, however, subject to the approval of the *Incorporated Law Society*, be allowed to go in for his examination; but he must enter into fresh articles for fifteen months, and complete his service under such articles, before he can be admitted.

Solicitors: *Whitakers & Woolbert.*

(1) Law Rep. 9 Q. B. 1.

NEWMAN *v.* PIERCEY.

M. R.
1876
Nov. 3.

[1875 N. 9.]

Will—Gift to Specified Number of Children—Mistake—Presumption as to Children intended.

In the case of a testamentary gift to children describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled, unless it can be inferred who are the particular children intended, in which case the Court holds those children entitled to the exclusion of the others.

Testatrix, by will made in 1873, bequeathed "to each of the three children of Mrs. *W.*, widow of *W. W.*, one hundred pounds." *W. W.*, brother of the testatrix, died in 1857, leaving a widow and three children, of whom one died in 1870, and two survived. Mrs. *W.* married again in 1858, and had six children by that marriage living at the date of the will. The evidence shewed that the testatrix knew of the second marriage, and that there were children of that marriage, but that she did not know their number; also that she had not seen Mrs. *W.* for six years before the date of her will:—

Held, that the two children by *W. W.* were alone entitled, and not the children of the second marriage.

Statement.

ELIZABETH HOCKLEY, the testatrix in the cause, by her will, dated the 8th of August, 1873, gave the following bequest: "To Mrs. (*sic*) *Walden*, widow of the late *William Walden*, one hundred pounds, and to each of her three children a like sum of one hundred pounds."

The testatrix died on the 7th of October, 1874.

At the date of the will there was no person who then answered the description of "Mrs. *Walden*, widow of *William Walden*," but the testatrix had a half brother, *William Walden*, who married in 1846, and died in 1857, leaving a widow, *Mary Walden*, who, in 1858, married *W. J. Punter*, and was still living.

Mrs. *Punter*, formerly Mrs. *Walden*, had five children by her first husband, of whom two died in infancy in their father's lifetime; one died, aged nineteen, in 1870, and two were living at the date of the will and still survived.

Mrs. *Punter* had seven children by her second marriage, of whom six were born before the date of the will.

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The suit was instituted by the executors for the administration of the estate. It was admitted that Mrs. *Punter* was the person intended by the testatrix, but the question arose, on further consideration, whether Mrs. *Punter's* two surviving children by *William Walden* were the only children entitled to legacies of £100 each, or whether the six children by her second husband were also entitled.

Mrs. *Punter* stated in her affidavit, that after her second marriage she did not see the testatrix so frequently as she had before, and did not see her at all within seven years of her death; but that whenever she did call upon the testatrix she stayed with her a considerable time, and had dinner or some other meal with her; that the testatrix was very friendly with her, was well acquainted with the fact of her second marriage, and knew that she had some children by her second husband.

The only other evidence was the affidavit of Mrs. *Figgins*, a sister of the testatrix, who stated that about the year 1872 the testatrix called on her and made particular inquiries about Mrs. *Punter*, of whom she spoke as "*Mary Williams*, widow, that was," and asked if the deponent knew where she lived, and how many children she had, but the deponent had not at that time any knowledge of Mrs. *Punter's* residence or of her children, and was not able to answer any of her inquiries.

Argument.

A. Thomson, for the Plaintiffs.

Fischer, Q.C., and *Mirams*, for the six children of Mrs. *Punter* by her second marriage living at the date of the will:—

There can be no doubt that Mrs. *Punter* is the person here intended, though inaccurately described as Mrs. *Walden*, the widow of *William Walden*. There was clearly a mistake as to the number of her children, for there were only two of the children by *William Walden* living at the date of the will, and, as Mrs. *Punter* had then eight children, there is nothing to shew which three children were intended; the result is that they are all entitled.

In *Daniell* v. *Daniell* (1), where by a will made in 1831 there was a bequest to the three children of *F. W.*, the sum of £500

(1) 3 De G. & Sm. 337.

each, and *F. W.* had then only three children to the knowledge of the testatrix, but had subsequently six more children, of whose births the testatrix was aware, and she made three successive wills, the last in 1844, each revoking the former one, but each repeating the bequest in the same words,—it was held that the bequest in the will of 1844 must be read as if the word "three" had been omitted or had been the word "nine."

In *Garvey* v. *Hibbert* (1), where a testator bequeathed to "the three children of *D.* the sum of £600 each," four children, all born before the date of the will, were held to be entitled to £600 each.

It may be said that the testatrix, in speaking of "the three children," was thinking of the child of the first marriage who had died in 1870, as three was the number of the family previously to that child's death, but where there is a mistake in the number the Court cannot speculate how it arose. Besides, it appears that the testatrix had not seen Mrs. *Punter* for seven years before she made her will. The words "widow of *William Walden*" cannot limit the gift, for she might still be spoken of as his widow after her second marriage.

In *Barrington* v. *Tristram* (2), there was a bequest for all the children of Mrs. *Tristram*, the wife of *Thomas Tristram*, in equal shares at twenty-one or marriage. *Thomas Tristram* died before the date of the will, leaving six children. His widow married again and had one child. It was held that her child by the second marriage was entitled to a share according to the rule that all the children must take, though there was a strong presumption that the children of the first marriage were alone intended.

In *Critchett* v. *Taynton* (3), where there was a devise to all the younger children of the testator's daughter, *S. B.*, with a gift over in case *S. B.* should die leaving no issue, or if the younger children should die under twenty-one or be married without consent, and *S. B.*, whose first husband was living at the date of the will, married again, and had a second family, it was held that the children of the second marriage took equally with the first.

In *Lee* v. *Lee* (4), under a gift to the four children of *H.*, who

(1) 19 Ves. 125.
(2) 6 Ibid. 345.
(3) 1 Russ. & My. 541.
(4) 10 Jur. (N.S.) 1041.

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had five children living at the date of the will, and known to the testator, Lord *Romilly* held that all the five children were entitled.

The rule deducible from the cases where a specified number of children is rejected on the ground of mistake is stated in *Hawkins* on Wills (1) and *Jarman* on Wills (2). On the same principle we submit that the eight children living at the date of the will, including those of the second marriage, as well as the two surviving children of the first marriage, are entitled to legacies of £100 each.

Chitty, Q.C., and *Warmington*, for four of the next of kin, and *Roxburgh*, Q.C., and *Bush*, for the rest of the next of kin, were not called on.

Judgment.

JESSEL, M.R.:—

Notwithstanding the expressions in some of the authorities (for without the authorities I do not think the case would have been decently arguable), I am unable to bring myself to the conclusion that I am compelled by the authorities to decide against what it is quite clear was the testatrix's intention, and which it is manifested was her intention by sufficient evidence.

The testatrix had a half-brother, *William Walden*, who had married, and died in her lifetime to her knowledge, leaving children. It appears that he had five children, two of whom died in early infancy; three grew up, of whom two are now living and have attained their full age; the third died at the age of nineteen in 1870. It further appears that the testatrix kept up friendly intercourse with her brother's widow, who had married again to her knowledge, for many years; but that such intercourse ceased in the year 1867. It is also clear that the testatrix, up to the year 1867, was well aware that Mrs. *Walden*, the widow of her brother, had three children by him living, and was also aware that she had married again, and had some children, although she did not know how many, by Mr. *Punter*, her second husband.

The will in question was made on the 8th of August, 1873, by which the testatrix gives to "Mrs. *Walden*" (she forgot her

(1) Page 62. (2) Vol. ii. p. 178.

christian name, and therefore left a blank for it), "widow of the late *William Walden*, one hundred pounds, and to each of her three children a like sum of one hundred pounds." On her death, and at the date of the will, there was no person of the name of "Mrs. *Walden*, widow of the late *William Walden*," and, therefore, there were no persons exactly answering the description of Mrs. *Walden* and her three children; consequently parol evidence was admissible to explain that. The parol evidence shewed, in addition to what I have already stated, that Mrs. *Hockley*, the testatrix, inquired of a Mrs. *Figgins*, probably not very long before August, 1873, when she made her will, if she knew where "*Mary Williams*, widow, that was" lived;—then evidently recollecting her christian name but not her surname—and how many children she had. But Mrs. *Figgins* could not tell her. So that it is obvious from that evidence that she did not then know the state of the family; and I take it there is no evidence to shew that she ever did know of the death of the daughter of Mrs. *Walden*, who died in 1870. There is evidence, to some extent, shewing that she did not, because I find her ignorant of the number of the children of "*Mary Williams*, widow, that was." That is the way in which she described the widow of her half-brother, and, if correctly repeated, that expression looks as if she knew that Mrs. *Williams* had been a widow, and ceased to be a widow. Mrs. *Punter's* own evidence does not go beyond what I have stated. It does not shew that the testatrix ever knew the number of the *Punter* children; but it does shew that she knew there were "some children" in the plural. Did she intend the legacies to the six *Punter* children as well as to the *Waldens?*

Now we must not throw out of consideration the description in the will. Do the *Punter* children fulfil that description? Could they at any time of their existence be described as the children of "Mrs. *Walden*, widow of the late *William Walden?*" Certainly not. They were all the children of Mrs. *Punter*, and at no period of their lives were they the children of "the widow of *William Walden*." She had ceased to be a widow before they were born, and certainly had ceased to be the widow of *William Walden*. In that sense, therefore, I think they are not properly described by those words.

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Who are properly described? Clearly the three children of whom the testatrix knew—the three children of the widow of *William Walden*, who had had three children, although one of them had died. In my opinion, according to the evidence, it is not shewn that the death of one of the children was known to the testatrix, and there is a very fair presumption that she did not know of it before the date of the will. I think there is evidence to shew me that the testatrix did intend to describe the one who is dead and the two children who are now living of "Mrs. *Walden*, widow of the late *William Walden*," and who happen to be her relatives, being her nephews or nieces, as the case may be. That, no doubt, was the motive of her bounty, and that favours the conclusion to which the Court has come.

That being my conclusion upon the evidence, is there any rule of law or any principle to be deduced from the decided cases which compels me to come to a different conclusion? If there were, I should do so most unhesitatingly, because it is no part of the duty of the Court to speculate or to discover what the intention of a testator is, except by legal means. Therefore, it is incumbent upon me to examine the authorities, and to see whether there is any such rule of law laid down by them. First of all, what is the rule? The rule cannot be stated more favourably, I think, than this: that where there is a gift to the children of any one, "children" means all the children, and it still means all the children, although the number of the children are specified, such as three children, four children, or five children, or whatever the number may be, unless there is some evidence to shew which of the children specified are meant, or, to put it in the way in which it was put by Sir *William Grant* in a case cited at the Bar, of *Garvey* v. *Hibbert* (1): "The ground on which the Court has proceeded is, that it is a mere slip in expression; the meaning is all children, or all servants, and the Court, conceiving the intention to be to give to each child so much, strikes out the specified number."

The rule is also stated in the case of *Yeats* v. *Yeats* (2). In citing *Yeats* v. *Yeats*, I must say I am by no means prepared to state that I should have come to the same conclusion upon the

(1) 19 Ves. 126. (2) 16 Beav. 170, 171.

facts of that case. But that does not at all affect the law. The law is, I conceive, rightly laid down in it, namely, first of all, if there is a latent ambiguity, extrinsic evidence can properly be adduced, as it was adduced in that case: "The principle on which this Court acts is well settled by authority. Where a testator gives a legacy between a class of persons, or separate and distinct legacies to each of a class, if the Court finds there are more of the class than those specified by the testator, it endeavours to find which of them were really meant; and if it is unable to discover them, then, in order that the legacy may not fail altogether, it infers or presumes that the testator intended to include all the class, notwithstanding the numerical error;" so that the principle is this, that the Court only resorts to striking out the number, which is a strong measure at all times with regard to a will or any other instrument, when it altogether fails to discover who is meant, that is, to discover who is meant both from the wording of the will and the extrinsic evidence, properly admissible.

In the case of *Wrightson* v. *Calvert* (1) Vice-Chancellor *Wood* states the principle thus: "The principle of the earlier cases on this subject was to avoid an intestacy by reason of uncertainty. If there is a gift to the two children of *A.* when *A.* in fact has three children, you must either act upon the general intent to benefit the class, and treat the statement of the number as a mistake, or else the gift must be held void for uncertainty, it being impossible to say which two out of the three are to take." That is stated a little too widely, and is not what the Vice-Chancellor meant, as is to be seen from the rest of his judgment. He meant to add, "Unless there is some evidence to enable me to find out who are meant." He does not mean that it is always impossible to say, but that in cases in which it is impossible to say which two out of three are to take, the gift must be held to be void for uncertainty. I find that in that very case it was not impossible to say who were meant, for the gift was to two persons who lived near a certain place, and evidence was adduced which excluded one of the three claimants upon the ground that he did not reside in the place in question.

I am now going to read a few words from Mr. *Hawkins's* well-

(1) 1 J. & H. 250.

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known book on Wills (1), where he states the results of the cases with his usual accuracy: "It is a convenient rule to remedy mistakes in the number of legatees intended by the testator, that where a gift to children describes them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled: unless it can be inferred who were the particular children intended." I think that is quite right. First, you must consider that the will meant the children of a particular person. I have already shewn that in this case the description of the parent of the children has aided me very much in coming to a conclusion. If the rest of the evidence is sufficient to enable the Court to infer who are meant, the Court is bound to do so, and, after all, it is only a presumption of a mistake on which the Court acts, which is rebutted by evidence which will raise the contrary presumption. The rule itself can be got rid of by that kind of evidence which fairly shews that that is not the right presumption, if you can reconcile the words of the will with the state of circumstances at the time, by leaving out a member of the class, or defining the class of persons who were intended to take by the will. But, as I have already stated, I have a clear conviction in this case that only the children of Mrs. *Walden* by Mr. *Walden* were intended to take.

Solicitors: *J. H. Kays; E. Mirams.*

(1) Page 62.

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[1873 M. 204.]

Ex parte WETHERALL.

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Solicitor and Client—Moneys entrusted to Solicitor for Investment—Parol Declaration of Trust—Letters and Conversations—Estoppel.

W., having entrusted *P.*, his solicitor, with a sum of £7700 for investment on mortgage on his behalf, was informed by *P.*'s clerk, in conversation, that "*P.* proposed to invest the money on mortgage of leasehold property at *Camden Town* at 5 per cent.," and subsequently received a letter from *P.* stating that "the money was put on 5 per cent. mortgage as arranged by my clerk with you." On *P.*'s death it was found that no mortgage existed in favour of *W.*, but that *P.* had advanced £100,000 to a firm of builders on a mortgage of their leasehold property at *Camden Town* :—

Held, that *P.* and those claiming under him were bound by the representation made by him, and were estopped from denying that the £7700 formed part of the £100,000 so invested.

9 Ch D 193
11 Ch D 773
774
13 Ch D 69
19 Ch D 24

PETITION.

Statement.

This was a creditor's suit for the administration of the estate of *Alfred Atkinson Pollock*, a solicitor, who died in August, 1873, leaving an insolvent estate. The object of this petition was to obtain payment, out of a fund in Court standing to the credit of the cause, of a sum of £7700, which the Petitioner, *Frederick Henry Pakenham Wetherall*, claimed to belong to him under the following circumstances:—

Pollock acted as solicitor for *Wetherall*, and was in the habit of receiving from time to time various sums of money on his behalf, procuring investments for them, and managing generally all his pecuniary transactions.

In the early part of the year 1871, *Wetherall* consulted *Pollock* as to a change of investment of certain moneys which were out on mortgage at a low rate of interest, when it was ultimately decided that the moneys should be called in and reinvested on some other mortgage security at 5 per cent. For this purpose, on the 27th of April, 1871, *Honour*, a clerk of *Pollock's*, called upon *Wetherall* to obtain his execution of the reconveyances of the existing secu-

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rities, and also his signature to a letter of authority to *Pollock* to receive the mortgage moneys, at the same time informing *Wetherall*, in answer to an inquiry on the subject, that "Mr. *Pollock* proposed to advance the moneys on security of leasehold property at *Camden Town* at 5 per cent." *Wetherall* thereupon executed the reconveyances and signed the necessary authority. He also instructed *Honour* to inform *Pollock* that the proposed advance might be made, provided he, *Pollock*, was satisfied of the value of the security.

The mortgage money was accordingly received by *Pollock* on the 5th of May, 1871. At that date the total sum then in his hands on *Wetherall's* behalf, inclusive of this money, consisted of the sum of £8126. This sum *Wetherall* allowed to remain in *Pollock's* hands, as he alleged, upon the faith of the statement previously made to him by *Honour*, and in the belief that the proposed mortgage investment would be made.

In the month of January, 1872, *Wetherall* wrote to *Pollock* for information as to the state of his account and the amount of interest due to him, and on the 24th of January, 1872, received the following reply:—

"My dear *Fred*,—I will have your account made up and sent to you. The principal sums were all put on 5 per cent. mortgage as arranged by Mr. *Honour* with you, and you have been having interest at that rate from the date of the receipt of the money."

No regular account was ever furnished to *Wetherall*, who, however, believed, as he alleged, that the moneys in *Pollock's* hands had been duly invested by him on mortgage.

On the 10th of August, 1873, *Pollock* suddenly died, and on investigating his affairs, it was found that no mortgage existed in favour of *Wetherall*, but that considerable leasehold property at *Camden Town* and *Kentish Town*, belonging to Messrs. *Mansbridge*, builders, was in mortgage to *Pollock* under several deeds dated respectively the 23rd of July, 1870, the 10th of September, 1872, and the 24th of July, 1873, for securing sums amounting together to upwards of £100,000, advanced in various sums from time to time, including some advances between the 5th of May, 1871, and the 24th of January, 1872; that *Pollock* had, shortly

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before his death, given instructions to his conveyancing clerk to prepare the necessary deeds for effecting a security in favour of *Wetherall* for £7700 on part of the property in *Kentish Town*, and that at *Pollock's* death a draft release of his charge on this property had already been prepared for that purpose, though it did not appear that he had ever communicated to Messrs. *Mansbridge* his intention of executing such a release. A draft account with *Wetherall* was also found amongst *Pollock's* papers containing the following entry in his handwriting:—"June 30, 1871—Amount set apart for advance on mortgage to Messrs. *Mansbridge*—£7700." The original draft of this account had been lost since *Pollock's* death, but a copy of it was produced by his accountant. There was also a pencil entry in *Pollock's* ledger, in his handwriting, of "advanced to Messrs. *Mansbridge*," against the balance of *Wetherall's* credit on the 1st of January, 1872.

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Messrs. *Mansbridge* having become bankrupt, portions of the property comprised in their mortgage to *Pollock* were sold under the authority of the Court, and the proceeds of sale were paid into Court in this suit and placed to a separate account.

Wetherall, who had carried in a claim as creditor under the administration decree for £8221, including the £7700, now presented this petition praying that the £7700 might be paid to him out of the fund in Court.

The facts above stated were deposed to by the Petitioner, and also by *Honour* and other clerks formerly in *Pollock's* employ.

Argument.

Chitty, Q.C., and *E. Ward*, for the Petitioner:—

We submit that the statement made to the Petitioner by *Pollock's* clerk in conversation on the 27th of April, 1871, coupled with *Pollock's* letter of the 24th of January, 1872, constitutes a sufficient parol declaration on the part of *Pollock* that he held moneys of the Petitioner in trust for investment on his behalf on a specific security; and the evidence shews that the £7700 was the amount actually invested on that security. There was never any denial by *Pollock* that he had received the money for investment, or that the investment was made; consequently this parol declaration was clearly binding upon him, and it is equally so upon his representatives, who are not at liberty to contradict his

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positive assertion: *Burrowes* v. *Lock* (1). This money being personal estate, the case does not fall within the *Statute of Frauds*, and the trust by averment can therefore be supported: *Benbow* v. *Townsend* (2); *Lewin* on Trusts (3). The common law doctrine of estoppel, in fact, applies to this case; *Jorden* v. *Money* (4), where Lord *Cranworth* draws the distinction between a representation of fact, constituting a contract, and a representation of intention, to which the doctrine of estoppel is applicable.

Fry, Q.C., and *Romer*, for the Plaintiff:—

We do not dispute the law, but we submit there is not sufficient evidence that the £7700 was advanced to Messrs. *Mansbridge* between the 5th of May, 1871, when it is said *Pollock* received the money, and the 24th of January, 1872, the date of his letter, for there does not appear to have been any mortgage or charge executed by Messrs. *Mansbridge* between those dates.

W. Barber, for the Defendant, *Pollock's* widow and legal personal representative.

Judgment.

JESSEL, M.R.:—

The particular case before me is simply this: *Pollock* was authorized by the Petitioner, his client, to receive a sum of £7700 in trust to invest it on a mortgage of leasehold property at *Camden Town*, and he received the money on that footing. On the 5th of May, 1871, *Pollock* receives the money, and on the 24th of January, 1872, he writes to his client that he has so invested it. It would seem that between the 5th of May, 1871, and the 24th of January, 1872, he had advanced moneys to Messrs. *Mansbridge* on mortgage of leasehold property of theirs at *Camden Town*. If he did in fact make the advance to Messrs. *Mansbridge* between those dates, the circumstance that the advance may have comprised other moneys besides the £7700 which he represented to the Petitioner had been invested makes no difference. He was, in my opinion, bound by his representation that the money was given him by the Petitioner for the purpose of the particular investment. That being so, it

(1) 10 Ves. 470, 473.
(2) 1 My. & K. 506.
(3) 6th Ed. pp. 47, 48.
(4) 5 H. L. C. 185.

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became impossible for him, or persons claiming under him, to say he did not make the advance.

It is perfectly plain that this advance must have priority over all the other advances made by *Pollock*, and there will, therefore, be an order for payment of the £7700 to the Petitioner with costs, subject, however, to the Plaintiff being satisfied by further evidence that £7700 was advanced by *Pollock* to Messrs. *Mansbridge* between the 5th of May, 1871, and the 24th of January, 1872.

Solicitors: *Newman, Stretton, & Hilliard; Farrer, Ouvry, & Co.; Ridsdale, Craddock, & Ridsdale.*

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1876
Nov. 6.

[1872 T. 41.]

Will—Gift to "Executors or Executrix"—Beneficial Interest—Costs—"Residue"—Lapsed Share—Exoneration.

A testatrix gave £100 to the "executors or executrix" of *C. C.* left an executor and two executrixes, who all predeceased the testatrix:—

Held, a gift to *C.*'s legal personal representatives as part of his estate.

A testatrix bequeathed her residuary personal estate to four persons. One of the shares lapsed through the death of the legatee in the testatrix's lifetime:—

Held, that the costs of a suit for the administration of the testatrix's estate were payable out of the residue generally, and not primarily out of the lapsed share.

Dictum of *Malins*, V.C., in *Gowan* v. *Broughton* (1) dissented from.

"Residue" of personal estate means the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of the administration of his estate, including the costs of an administration suit.

Statement.

FURTHER CONSIDERATION.

Julia Elizabeth Rachel Bailey, widow, who died on the 8th of February, 1872, by her will, dated the 9th of August, 1865, made the following bequest:—"I give and bequeath to the executors or executrix of *James Webb Courtis* the sum of £100." And she gave and bequeathed the residue of her estate and effects to the four persons therein named equally.

James Webb Courtis died in 1857, before the date of the will of

(1) Law Rep. 19 Eq. 77.

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the testatrix, and by his will appointed an executor and two executrixes, by whom the will was duly proved. They all, however, predeceased the testatrix, Mrs. *Bailey*. The share of one of Mrs. *Bailey's* residuary legatees lapsed on account of the death of the legatee in her lifetime.

Two questions arose in this suit, which was for the general administration of Mrs. *Bailey's* estate, first, whether the legacy of £100 was given to *J. W. Courtis's* representatives beneficially, or merely as part of his estate; and, secondly, whether the costs of the suit should be borne by the residuary personal estate generally, or primarily by the lapsed share.

Argument.

Chitty, Q.C., and *W. S. Owen*, for the Plaintiff, the testatrix's legal personal representative, and one of the three surviving residuary legatees:—

As to the first point; we submit that the gift was to *Courtis's* executor and executrixes beneficially, as *personæ designatæ*, and that as they all predeceased the testatrix the legacy lapsed. The law is thus stated in *Roper* on Legacies (1): "If no interest were given to *B.*, and the bequest were to his executors and administrators, it should seem that the individuals answering the description would be beneficially entitled, as *personæ designatæ*, in analogy to the devise of real estate to the heir of *B.* without a previous limitation to *B.*, whose heir would take by purchase in his own right, and not by force of the word "heir" considered as a term of limitation."

[JESSEL, M.R.:—I see no analogy. The heir may be designated with some degree of certainty, but how can any one say who will be a man's executors at the time of his death?]

The form of the gift to the "executors or executrix" is peculiar, and there is no authority precisely applicable. The word "executrixes" occurs in *Long* v. *Watkinson* (2), where a gift to the "executors or executrixes" whom the testator's sister might appoint was held to be a gift in trust only. But that case is not identical with this.

[JESSEL, M.R., mentioned *Mackenzie* v. *Mackenzie* (3).]

(1) 4th Ed. vol. i. p. 135. (2) 17 Beav. 471.
(3) 3 Mac. & G. 559.

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As to the second point; we submit that the costs should be borne primarily by the lapsed share. In *Gowan* v. *Broughton* (1) Vice-Chancellor *Malins* considered that a lapsed share of residuary personal estate should exonerate the other shares, and be the primary fund for payment of the costs of an administration suit, just as in the case of a lapsed share of residuary real estate: *Scott* v. *Cumberland* (2), decided by the same Judge.

Davey, Q.C., and *Kekewich*, for the two other surviving residuary legatees, supported the Plaintiff's contention.

Roxburgh, Q.C., and *C. Batten*, for the heir-at-law and two of the next of kin of the testatrix, and

Medd, for other next of kin, were only called upon to argue the second point:—

The rule established by the older authorities is that the costs of an administration suit must be borne by the whole of the residuary personal estate before any distribution can take place: *Elborne* v. *Goode* (3); *Shuttleworth* v. *Howarth* (4). *Scott* v. *Cumberland* had reference to real estate only, and in *Gowan* v. *Broughton* Vice-Chancellor *Malins's* expression of opinion was a mere *dictum*, and not necessary for the decision of the particular case before him.

Judgment.

JESSEL, M.R.:—

Upon the first point, my opinion is that this legacy is part of the personal estate of *James Webb Courtis*. First, What is the meaning of the gift to his "executors or executrix?" I am satisfied it is an imperfect description of the legal personal representatives. It is impossible to suppose that there is any difference between a gift to "executors," and a gift to "executors and executrix;" a gift to "executors and administrators," or a gift to "executors and executrixes," or even a gift to the "administrators" of a dead man. I therefore read this as a gift to the legal personal representatives of *James Webb Courtis*, a dead man.

Now, what is the meaning of such an interest? I take it to be

(1) Law Rep. 19 Eq. 77.
(2) Ibid. 18 Eq. 578.
(3) 14 Sim. 165.
(4) Cr. & P. 228.

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settled by authority that a gift to the legal personal representatives of a dead man is not a gift to them beneficially. *Primâ facie*, it is a gift to them to be held as part of the personal estate, and there is an obvious reason for this. Nobody knows who the legal personal representatives of a dead man may be at his own death. The original executors may die and leave three executors, all of whom may die and be succeeded by three more, and those three again may die and be succeeded by three more. It is absurd to suppose that when a bequest is made to persons holding such an office the testator intends them to take beneficially. The only reason for making the bequest to them at all is that they shall hold the property bequeathed as the personal estate of the dead man, which makes it their duty to distribute the property so bequeathed as part of his personal estate. I think, therefore, both upon principle and upon the authorities, as I read them, that this legacy must be held to pass to the legal personal representatives, and there will be a declaration accordingly.

With regard to the second point, I am sorry that I must entirely differ from the learned Vice-Chancellor *Malins* in the conclusion he has come to as to the state of the law respecting the incidence of costs of administration suits as between a share of residue well bequeathed and another share of residue which has lapsed and therefore devolved upon the next of kin. It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue at all, and when you do arrive at it, it is distributed according to law. That is the principle.

Now, as regard the authorities. I find the very point so decided by Vice-Chancellor *Shadwell* in the year 1844, in the case of *Elborne* v. *Goode* (1), and I find that that case was cited before the learned Vice-Chancellor *Malins* in *Gowan* v. *Broughton* (2), to which I have been referred, and also in *Scott* v. *Cumberland* (3), which had been before the Vice-Chancellor a few months previously.

(1) 14 Sim. 165. (2) Law Rep. 19 Eq. 77.
(3) Law Rep. 18 Eq. 578.

But the matter does not stop there. I have before me the decision of Lord *Cottenham*, which, being the decision of a Lord Chancellor, was of course binding upon the Vice-Chancellor, even if he thought himself at liberty in 1874 to disregard a decision of a Vice-Chancellor in 1844 upon a point of general law, though I may say I should not have felt myself at liberty to do so. In the case of *Shuttleworth* v. *Howarth* (1) Lord Chancellor *Cottenham* not only thinks the law is settled, but actually states that law as an illustration of another case. His words are these (2): "Take the case where the residue is undisposed of. It is not attempted to be shewn that, in that case, the principle of apportionment which is now contended for has ever been applied, as between different branches of next of kin; and yet, if there were a difference between the cases, there would seem to be more reason for its application in that case than in the present, inasmuch as the difficulty here having arisen from the testator's own act, it would seem to be more fit that his estate should bear the expense occasioned by it; but there is, in fact, no such difference, because what is to be distributed in both cases is the residue, and the residue is that which remains after all the expenses of administering the estate have been paid." That is Lord *Cottenham's* definition of residue, differing, it appears to me, from that of the Vice-Chancellor *Malins*. That being so, I am of opinion, both upon principle and upon authority, that the costs of this suit must be paid in the first instance out of the personal estate, and then the residue will be divided among the legatees and next of kin according to their respective rights.

I must, however, guard myself against being supposed to assent to or dissent from *Scott* v. *Cumberland* (3), which had reference to real estate. Whenever that point arises I will consider it. At present I am only deciding as to personal estate.

Solicitors: *Walters & Gush*, agents for *Sole & Gill, Devonport; Gregory, Rowcliffes, & Rawle; Wedlake & Letts; Childs & Batten.*

(1) Cr. & P. 228. (2) Cr. & Ph. 232.
(3) Law Rep. 18 Eq. 578.

M. R.

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Nov. 8.

STONER *v.* TODD.

[1875 S. 53.]

Patent—Novelty—Prior Publication—Provisional Specification, Part of, omitted in Final Specification.

A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification.

Where a provisional specification contained an incomplete description, part of which was omitted in the final specification :—

Held, that there was no prior publication of the part omitted so as to vitiate a subsequent patent of a similar invention on the ground of want of novelty.

Statement.

THE Plaintiff was the equitable owner of letters patent, dated the 26th of April, 1866, and granted to one *Thomas Kirby*, for the invention of "Improvements in apparatus or machinery for raising or lowering revolving shutters." The bill was filed to restrain the Defendants from an alleged infringement of the said letters patent.

One of the defences raised by the Defendants' answer was that of want of novelty in the invention, which they alleged had been anticipated by the invention of one *Alexander Clark*, who in November, 1856, had left at the Patent Office a provisional specification of a patent for certain improvements in the application and construction of revolving window shutters, which contained the following paragraph :—

"A further improvement in revolving shutters consists in supporting the rollers on which they are wound in slot bearings, to permit the rollers to advance nearer to or recede from the side grooves down which the shutters slide, whereby the roller named the relieving roller may be dispensed with, *or effected by double eccentrics or cambs acting on hollows or notches on the bottom of the slot bearings.*"

The words in italics were relied on as an anticipation of the Plaintiff's invention.

It appeared, however, that when *Clark* filed his final specification, the words in italics were omitted from the description.

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Argument.

Aston, Q.C., and *Langley* (*Roxburgh*, Q.C., with them), for the Plaintiff:—

The defence of want of novelty cannot be sustained. The provisional specification of *Clark* relied on by the Defendant as a prior publication was in part abandoned in the final specification, and cannot be regarded as a complete description of the invention. The invention has not been made public in such a way as that persons conversant with the subject may be assumed to have become acquainted with it: *Plimpton* v. *Malcolmson* (1).

Chitty, Q.C., and *Rigby*, for the Defendant:—

The invention of *Clark* was completely described in the provisional specification, which was sufficient to have enabled any skilled workman to make the thing described. A provisional specification is not bound to be so precise as the final specification. It may be a mere sketch to protect the inventor till the final specification is completed. It matters not at all for the purpose whether the description was in a provisional or a final specification, or even communicated to a newspaper; if there is a sufficient description given to the world, that prevents any other inventor from availing himself of it. Testing it in this way, we submit that *Clark's* provisional specification was a prior publication of the Plaintiff's invention.

Judgment.

JESSEL, M.R.:—

The first question I have to decide is whether an invention alleged to be disclosed in a provisional specification of one *Alexander Clark*, in the year 1856, is an anticipation of the patent for which this action is brought. This raises a point which is quite new. In order to determine it, I must consider first the nature of a provisional specification and the effect of a provisional specification on the final specification of the same invention. It is very material to consider both these points.

In the first place, a provisional specification was never intended to be more than a mode of protecting an inventor until the time for filing the final specification. It was not intended to contain a

(1) 3 Ch. D. 531.

M. R. 1876 STONER v. TODD. Judgment.

complete description of the thing so as to enable any workman of ordinary skill to make it, but only to disclose the invention, fairly no doubt, but in its rough state, until the inventor could perfect its details.

Again, the provisional specification, as such, is not and cannot be known to the public; it is never published unless with the final specification, when they become parts of the same document, except in cases where the time has passed within which the final specification must be filed or treated as abandoned.

That being so, we do not find, as a rule, that complete description in a provisional specification which is required to enable a workman of ordinary skill to carry out the invention. When we find in the final specification that, in the description of one of the subordinate matters of the invention, one of the details has been abandoned, that is a notification to the public that the inventor could not work it, or thought it useless, and has consequently omitted it altogether. Therefore I do not consider that the insertion of a sketch in this provisional specification gives such information to the world as to amount to publication.

At the same time I exclude from consideration those cases in which the provisional specification contains as complete a description of the invention as the final specification, and I confine my remarks to those cases in which there is a mere sketch. For the reasons I have stated, I should hold that a sketch such as this does not amount to such a publication as to avoid a subsequent patent for the same thing. I am not one of those who think that inventors are to be deprived of the fruits of their labours by previous sketches of inventions by others. There are very few inventions that have not been in some way anticipated or preceded by some notion or trial that has not been successfully prosecuted. This may be illustrated by the invention of the steam-engine, and by the discovery of the circulation of the blood. There is nothing that is entirely novel. Therefore the Court should be slow to listen to those who say that the same invention has been published before in a sketch like this which is more or less imperfect.

The next question is whether, assuming that a sketch in a provisional specification can, under any circumstances, amount to prior publication, this is a sufficient description of the invention at all?

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It was observed by *Parke*, B., in *Neilson* v. *Harford* (1), speaking of the sufficiency of a specification, "You are not to ask yourselves the question whether persons of great skill would do it . . . that is not the description of persons to whom this specification is supposed to be addressed—it is supposed to be addressed to a practical workman, who brings the ordinary degree of knowledge and the ordinary degree of capacity to the subject." That must be the real test of the matter, and, applying it to this invention, which is not a very complicated piece of machinery, I find these words in *Clark's* provisional specification: "The relieving roller may be dispensed with or effected by double eccentrics or cambs acting on hollows or notches on the bottom of the slot bearings." I am of opinion that these words are not sufficient to enable a practical workman to make a roller shutter of the kind manufactured by the Plaintiff, and I decide that *Clark's* provisional specification was not a prior publication of the Plaintiff's patent.

Solicitors: *Collette & Collette; Emmet & Son.*

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Nov. 4, 11.

Will—Power of Appointment—"Children or Issue"—Exclusive Power.

A testatrix bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my said daughter shall by deed or will appoint":—

Held, that the daughter's power was exclusive.

Garthwaite v. *Robinson* (2) disapproved of.

Stolworthy v. *Sancroft* (3) considered.

15 Ch D 620
634

Affirmed 15 Ch D. 622. C.A.

Statement.

MARY VEALE, widow, by her will, dated the 18th of August, 1823, bequeathed a sum of 4 per. Cent. Bank Annuities and a sum of cash to trustees therein named, upon trust to pay the income thereof respectively to her daughter *Mary Elizabeth Veale* for her life, and from and immediately after her decease, if there should be no child or children of the said *Mary Elizabeth Veale* (as was

(1) 1 Webs. P. R. 298, 314. (2) 2 Sim. 43.
(3) 10 Jur. (N.S.) 762.

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the case), "upon trust to pay and apply all the same trust moneys and to assign and transfer the security and stock in and upon which the same shall be then invested to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my said daughter *Mary Elizabeth Veale* shall by deed or will direct, limit, and appoint; and in default of such direction, limitation, and appointment, I direct that the same shall fall into and form part of my residuary estate." And the testatrix bequeathed all the residue of her personal estate to her son *William Veale.*

The testatrix died in 1825, leaving her surviving *Mary Elizabeth Veale*, two other daughters, and a son, *William Veale.*

Mary Elizabeth Veale died on the 18th of January, 1865, having by her will, dated the 3rd of June, 1856, given the trust fund to her executors therein named upon trust for her niece *Emilia Mary Butler* during her life, and after her death for the use and benefit of any child or children, or issue of any child or children, of her said niece who should be living at her said niece's death, to be equally divided between them, the issue of deceased children taking their parents' shares.

There were living at the death of *Mary Elizabeth Veale* her brother and two sisters, also three children of one of the sisters, *Emilia Mary Butler* being one of such children, and four children of Mrs. *Butler.*

The trust fund, consisting of the sum of £1404 New 3 per Cent. Bank Annuities, having been transferred into Court, under the *Trustee Relief Act*, by the surviving trustee of the will of *Mary Elizabeth Veale*, a petition was now presented by the trustees of the will of *William Veale*, who had died, praying that the fund might be paid out to them on the ground that *Mary Elizabeth Veale's* will was an invalid exercise of the power given to her by her mother's will, and that, consequently, the fund passed under the latter will as in default of appointment.

Argument.

Bagshawe, Q.C., and *Methold*, for the Petitioners:—

We submit that this is a distributive or non-exclusive power, and that the appointment by the donee to some only of the class—"children or issue of children" of the testatrix, *Mary Veale*—was

unauthorized and void, and the fund, therefore, goes as in default of appointment. It is a well-established rule that the words "to or amongst," uncontrolled, create a non-exclusive power, and there is nothing to shew that the power must be exclusive in the fact that the objects are a class—such as children or issue—capable of being increased and not ascertainable till the donee's death, whether the issue are to take with or in substitution for their parents. In *Robinson* v. *Sykes* (1) a power in a marriage settlement to appoint "unto and amongst such child or children of the marriage, or unto and amongst the issue of such child or children in case such child or children should be then dead (that is, at the death of the survivor of the husband and wife) leaving issue (which event happened), in such shares and proportions as the husband should appoint," was held to be a non-exclusive power, and to have been badly exercised in favour of some only of the issue of the marriage. Here the power is exerciseable among "children or issue of children," and the most probable construction seems to be that the "issue" were intended to be objects of the power by substitution: *Fox* v. *Gregg* (2).

[JESSEL, M.R.:—There, there was a substitutionary clause. Here there is not a word about substitution.]

In *Margitson* v. *Hall* (3) a gift to "children *or* grandchildren" was held to be substitutional, although there was no substitutionary clause. But if the power is not exerciseable in favour of issue taking by substitution, then it is a power in favour of an aggregate class of children and issue, and the question then arises, when is that class to be ascertained? We submit, at the death of the donee: *Routledge* v. *Dorril* (4). In *Garthwaite* v. *Robinson* (5) it was held that a power to appoint amongst the testator's "present or future grandchildren or their respective issue" did not authorize the exclusion of the children of a deceased grandchild who were living at the donee's death.

[JESSEL, M.R.:—In that case the Vice-Chancellor's judgment was based on the grammatical construction of the words in which

(1) 23 Beav. 40.
(2) *Sugden* on Powers, p. 946; *Farwell* on Powers, p. 410.
(3) 10 Jur. (N.S.) 89.
(4) 2 Ves. 357, 361.
(5) 2 Sim. 43.

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the power was given. The question as to the effect of a power in favour of "issue" indefinitely was not discussed. In the present case, how can this be a distributive power, when the objects cannot be ascertained till at or after the death of the donee?]

Argument.

Routledge v. *Dorril* shews that those only in existence at the death can take.

[JESSEL, M.R.:—*Routledge* v. *Dorril* (1) is commonly cited as an authority that where a power is unlimited as to its objects, yet, if the appointment is within the limits allowed by law, it is good, and the remarks of the Master of the Rolls are *dicta* in favour of that view.]

The case most like the present is *Stolworthy* v. *Sancroft* (2), where the testator gave real estate to *A.* for life, and after her decease, "in case she should leave issue in such manner amongst such issue as she should by deed or will appoint," and it was held that all the issue living at *A.'s* death were objects of the power, and that an appointment in favour of some of them only was bad.

[They also referred to *Brown* v. *Higgs* (3).]

[JESSEL, M.R., referred to *Farwell* on Powers (4), *Spring* v. *Biles* (5), and *Harley* v. *Mitford* (6).]

Northmore Lawrence, for Mrs. *Butler* and her children, was not called upon.

Judgment.

Nov. 11. JESSEL, M.R.:—

Since the last occasion on which it came before me, I have had an opportunity of considering this case, which has been elaborately argued. The real question is, what is the law upon the point as to whether this power is exclusive or not? Now, I am not going to lay down any new law on the subject of exclusive appointments, but I will take the law as enunciated in the most recent text-book on the subject, Mr. *Farwell's* work on Powers, published in 1874. Mr. *Farwell* says (7): "Each case must

(1) 2 Ves. 357, 361.
(2) 10 Jur. (N.S.) 762.
(3) 4 Ves. 708 8 Ves. 561.
(4) Page 294.
(5) 1 T. R. 435, n.
(6) 21 Beav. 280.
(7) Page 294.

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depend on the intention expressed in the particular instrument creating the power; no general rule can be laid down, except perhaps that the words 'all and every' are mandatory, and make it necessary that each object should have a share (1), and that 'such' authorizes exclusion, unless a contrary intention appear." I have no doubt that is the law. The Court must have regard to the intention expressed in the instrument creating the power, and that doctrine was not disputed at the bar. I must, therefore, ascertain the intention of the testatrix in this case. In inquiring what is the meaning of the words she has used, it is no answer to say that in the case of some other instrument containing similar but not identical expressions it has been held that the donee of the power was not authorized to exclude any objects of the particular class. The question is one of construction. What is the general rule? I must first look at the instrument before me to see whether there are any words which prevent this power from being read as an exclusive power. There have been cases in which such words as "all and every," or "unto or among," have been held not to authorize an exclusive appointment. But the use of such expressions is not conclusive. In cases of this description one often finds words which receive different interpretations according as they present themselves differently to the mind of the Judge who is endeavouring to construe the particular instrument before him, but a long course of decisions shews that merely to rely upon the particular words used is not sufficient. It is not a right or sound canon of construction to say that such and such a word has been held in such and such a case not to be sufficient to make the power exclusive. First read your instrument, and then see what meaning is to be attached to the words. Now, what are the trusts in this case? The testatrix gives the fund to her daughter, *Mary Elizabeth Veale*, for her life, and after her death without children (as was the case) "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form as my said daughter *Mary Elizabeth Veale* shall by deed or will direct, limit, and appoint," and in default of appointment the fund is to fall into the residue.

(1) 5 Ves. 857.

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Judgment.

Now, in the first place, the rule being to ascertain the meaning of the instrument, I have the words, "to and amongst my other children or their issue in such shares and proportions, manner and form as my daughter shall appoint."

The words are "amongst my other children or their issue." It was at first argued that the words "or issue" were substitutional, but that argument was soon given up. It is plain you must select from the class. It was then argued that the appointment must be among the children or issue living at the death of the donee of the power, and that as she did not exercise the power in favour of all those objects, the appointment was bad. Now, where do you find in the will any expressions shewing an intention on the part of the testatrix that the objects of the power were to be limited to those living at the death of the appointor? I find the word "issue," simply, meaning issue for ever. The testatrix fixes no limit. Therefore, as the words stand, the donee of the power must appoint to issue for ever, that is, to descendants of every generation. Upon the actual words of the will, you have no right to limit the power, but you have a right to limit it to a class to whom a valid appointment can be made under the law against perpetuity. If you admit the proposition that the power must be exercised in favour of that class, it follows that the donee was bound to make an appointment to every one of the issue of the testatrix living at her own death, or born within twenty-one years afterwards. How could she possibly do this unless she were gifted with some extraordinary power of prophecy? But even if the power is limited to the class of issue living at the death of the appointor, the same difficulty arises. She must in that case appoint to every one of the issue who may be living at the moment of her death. How could she make any appointment while *in articulo mortis?* And moreover, children *en ventre sa mère* must also be included, so that while *in articulo mortis* she must ascertain whether any of her female relatives are in an interesting condition! The absurdity of such a construction of the power is so great that unless I am actually driven to it by authority I cannot hold that a power to appoint to "children or issue" is a non-exclusive power in favour of the whole of the issue living at the death of the appointor or born within due time afterwards.

Then is there ground for saying that a power of appointment is exclusive, when the objects are not readily ascertainable, or, as in this case, cannot possibly be ascertained? There is authority on the point. It has been held, in *Mahon* v. *Savage* (1), that a direction to distribute among "poor relations" is from its nature an exclusive power, although a power to appoint to "children" has been held to be non-exclusive. It is true that in some cases powers in favour of "children" are open to the same observations I have made as regards powers in favour of "issue," but there is a reason for holding a power as regards "children" to be non-exclusive which does not apply to the other class. The original rule of equity was that, where there was a power in favour of "children," the intention must be held to be that each child should have provision made for it in the nature of a portion. Practically there could be no difficulty in effecting such an intention, as the number of children could be generally ascertained, and the rule is applicable to the familiar and ordinary cases of life, and not to exceptional cases. In most cases the probable full number of children can be sufficiently ascertained by the time an appointment is required to be made for the benefit of the eldest. That, then, is the settled rule. I will read only a few words from the case of *Spring* v. *Biles* (2). There it was a gift by will to the testator's wife to dispose of by will "to and amongst such of my relations as shall be living at the time of my decease." The time for ascertaining the class was not at the wife's decease but at the testator's decease. There was nothing indefinite as to the class which were to be the objects of the power. It was held that the wife had a power of selection amongst the class. Mr. Justice *Buller* said, "The cases of powers to distribute among children stand on very different grounds; for the Courts have considered them as portions to the children." The early cases on the subject were decided not long after the rule was established. In *Mahon* v. *Savage* a legacy was distributable by the testator's executors among his "poor relations," and it was held that the executors had a discretionary power, and were not bound to distribute among all the testator's poor relations. That decision was

(1) 1 Sch. & Lef. 111.

(2) 1 T. R. 435, n., 438, n.

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based on sound principle, for where a man leaves an indefinite gift such as a gift to "poor relations," he cannot intend that every one who may possibly come within that class shall participate in the gift. With regard to the case of *Garthwaite* v. *Robinson* (1), decided by Vice-Chancellor *Shadwell*, I must confess I should not have decided that case in the same way that he did. It was decided as a pure and simple question of the construction of a will. The will there was different from the will now before me, and no general rule of law was laid down. I must say the Vice-Chancellor came to the conclusion he did for reasons which I am unable to appreciate. It cannot be expected that the minds of any two Judges will always adopt the same view of the construction of particular words used by a testator, and therefore a decision on the mere meaning of such words is of little value. Words which strike one mind as of great importance do not strike another mind in the same way, and possibly the Vice-Chancellor attached greater weight to particular words than I should have done. In that case the power was to appoint among the testators "present or future grandchildren or their respective issue," and the Vice-Chancellor held that the power had been badly executed on account of the exclusion of the children of a deceased grandchild, who were living at the donee's death. I should be entirely unable, on that will, to arrive at that conclusion, and if I had to construe the same words I should feel myself at liberty, according to the rule laid down by the House of Lords in *Jenkins* v. *Hughes* (2)—that one Judge is not bound to follow the decisions of another on questions of mere verbal interpretation—to decline following that decision. Moreover, the point as to the effect of a power to appoint among issue indefinitely was not argued. The other case which was cited, *Stolworthy* v. *Sancroft* (3), before Vice-Chancellor *Kindersley*, requires more serious consideration, for, first, the case is more like this, and, secondly, a similar point was argued. Whether or not I should have arrived at the same conclusion as the Vice-Chancellor I cannot say, but the point was not quite missed at all events. There the testator gave an estate to trustees in trust for *A.* for

(1) 2 Sim. 43.
(2) 8 H. L. C. 571.
(3) 10 Jur. (N.S.) 762.

life, and after her decease, "in case she should leave issue, upon trust to dispose of his said estate in such manner, amongst such issue" as *A.* should by deed or will appoint, and it was held that an appointment by *A.* among some only of her issue living at her death was bad. Now the peculiarity of that case was that the power was to be exercised by *A.* "in case she should leave issue." It therefore involved the absurdity that the power could not be exercised except upon her death. And if "issue" meant issue indefinitely, it involved the further absurdity that the donee, if the power was non-exclusive, was bound to appoint to issue born after her death. But, even supposing the objects of the power were restricted to issue born in the lifetime of the donee, how could she ascertain while *in articulo mortis* how many grandchildren or great-grandchildren she had at that moment, and then exercise her power? for if the power was non-exclusive, she must have appointed to every one of her issue who might be living at the actual moment of her death. But these considerations were not pressed on the Vice-Chancellor. He says in his judgment, "It is contended that if the objects of the power are confined to issue living at the death, it was absurd to give a power by deed as well as by will, because if there was a partial exercise of the power by deed in favour of one object, raising the question of exclusive appointment in the lifetime of the donee, then, if that person died before the donee, the appointment would fail, as that person would not be an object of the power. I agree in the justice of that observation, but I am at a loss to see why that is more absurd than that the power was not to arise unless she left issue living at her death." That is, the Vice-Chancellor gets rid of one absurdity by shewing another absurdity; but that is no answer. I cannot regard that case as an authority for the construction of the particular instrument before me, which differs in form from that before the Vice-Chancellor. No general law was there laid down, unless it was this, that whenever a testator is so absurd as to give a power of appointment in case the donee of the power leaves issue, to be exercised in favour of such issue, the power must be considered as a non-exclusive power exerciseable in favour of every one of the issue which may happen to be in existence at

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the death of the donee. I do not regard that case as standing in my way, when I am able to put a rational construction on the instrument before me, and I must therefore hold that this power was an exclusive power, and has been well exercised by the will of the donee.

Solicitors: *Bolton & Co.; Kendall & Congreve.*

M. R. 1876 *Nov.* 18.

In re SMITH'S ESTATE.

Will—Mortgaged Estate—Mortgagee Trustee—Residuary Gift—Charge of Debts and Legacies.

5 Ch. D. 505

A testator, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof for her life; and subject as aforesaid, such residue to remain in trust for *C.* There was no express devise of trust or mortgaged estates:—

Held, that the legal estate in the mortgaged property did not pass under the will.

Quære, whether the legal estate would have passed, had the mortgage money belonged to the testator in his own right.

Statement.

PETITION.

By an indenture of mortgage dated the 20th of March, 1866, the Petitioners conveyed a piece of freehold land at *Stoke Newington* to *George Smith* in fee by way of mortgage for securing a sum of £3000 and interest of which he was a trustee.

George Smith, by his will, dated the 12th of June, 1866, after certain specific bequests, devised and bequeathed all the residue of his real and personal estate unto and to the use of his wife, *Eliza Smith*, her heirs, executors, administrators and assigns, according to the respective natures thereof, upon trust either to leave the same or any part thereof in the state of investment in which the same might be at the time of his decease, or to sell or call in the same, or any part or parts thereof from time to time, and convert

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the same into money, and out of the proceeds thereof to pay his debts, funeral and testamentary expenses; and in the next place, upon trust that his said wife should retain the sum of £2000 as her own absolute property, and in the next place pay to each of his servants one year's wages, and invest the residue in manner therein mentioned; and upon further trust that she should retain during her life, for her separate use, the income of the remainder of his said residuary estate, whether the same should have been converted into money and reinvested or not; and subject as aforesaid such remainder of his residuary estate should remain and be in trust for *Philip Smith Coxe* absolutely. And the testator appointed his said wife his executrix.

Statement.

The will contained no express devise of trust or mortgaged estates.

The testator died on the 3rd of February, 1867, and on the 30th of April following his executrix transferred the mortgage debt and security to *Robert Ralph Noel*, who on the 14th of September, 1876, reconveyed the property to the Petitioners on discharge of the debt.

The Petitioners having recently entered into a contract for sale of part of the property, an objection was raised by the purchaser that the legal estate which was vested in *George Smith* at the time of his death did not pass by his will, but descended to his heir-at-law.

In order to satisfy the purchaser and remove all doubt upon the title, the Petitioners now asked for an order vesting in them the legal estate in the mortgaged property.

Argument.

Everitt, for the Petitioners:—

This petition is rendered necessary in consequence of the apparently conflicting decisions of your Lordship in *In re Packman and Moss* (1), and Vice-Chancellor *Malins* in *In re Brown and Sibly's Contract* (2).

Judgment.

JESSEL, M.R.:—

This case is not the same as that before the learned Vice-Chancellor. In all these cases, the rule to be adopted in order to

(1) 1 Ch. D. 214. (2) 3 Ch. D. 156.

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ascertain whether trust or mortgaged estates pass, is to gather the intention of the testator from the particular words he has used. Applying that rule in the present instance, it seems clear, whatever might have been the case if the mortgage money had belonged to the testator in his own right, the testator was by his will dealing with his own property, not with that of which he was mortgagee, he being trustee of the mortgage money.

There will therefore be a vesting order.

Solicitor: *R. H. Pearpoint.*

UNGLEY *v.* UNGLEY.

V.-C. M.

1876

Nov. 8.

[1875 U. 25.]

Specific Performance—Statute of Frauds—Parol Agreement—Part Performance —Possession—Marriage—Consideration.

A father verbally promised, in contemplation of the marriage of his daughter, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold, and was subject to a charge in favour of a building society, payable by instalments. The father paid those which fell due during his lifetime, and at his death there remained a balance of £110, which fell due shortly afterwards:—

Held, that, the verbal promise to give the house having been established, the possession was a part performance which took the case out of the *Statute of Frauds*, that the contract was to give the house free from incumbrances, and that the £110 was payable out of the father's estate.

Statement.

THIS was a suit for the administration of the estate of *William Ungley*, who died intestate on the 10th of August, 1875, leaving two children, a son and a daughter, who had both attained twenty-one, and a widow, the stepmother of the children.

William Henry Ungley, the son, heir-at-law, and administrator, was the Plaintiff, and *Jane Ungley*, the widow, and *Margaret Kendall*, the daughter, and her husband, *William John Kendall*, were Defendants.

The intestate's personalty was estimated at about the value of £1260, including a leasehold house, at which he carried on his business, and another in *Westbourne Road, Barnsbury*, which he acquired as a member of the *Clerkenwell Bowkett Benefit Building Society*, in 1871. He had also a small amount of real estate, consisting of some freehold ground rents subject to a mortgage.

Mr. and Mrs. *Kendall* claimed the house at *Barnsbury* as having been a gift to her on her marriage, which took place on the 16th of December, 1871. The circumstances of the alleged gift were, as stated by the answer, to the effect that in October, 1871, the intestate informed his daughter and her intended husband that he had bought a house which should, in the event of their marriage taking place, be his wedding present to his daughter, and that

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they were to take possession as soon as the marriage should have been solemnized.

The intestate had in fact before that time acquired the lease of the house in question subject to the payment to the building society of instalments as they fell due, these instalments being secured in the usual way on the house.

Immediately upon the marriage, which took place on the 16th of December, 1871, the daughter and her husband entered into possession of the house, and they continued in occupation till the intestate's death, the husband paying the ground rent and rates and taxes.

Some of the instalments of the purchase-money fell due during the intestate's lifetime, and he regularly paid them. At his death there remained a sum of £110 still to be paid, which had since fallen due.

The answer also stated that Mr. *Kendall* had applied to the intestate to complete the gift and execute an assignment of the lease to his daughter, and that he had expressed the intention of making the assignment when all the instalments should have been paid.

The answer claimed to have the gift completed, and to have the £110 paid out of the personal estate, and, if that were insufficient, out of the realty, and to have an assignment made to or for the benefit of Mrs. *Kendall*.

The evidence of the Defendant's witnesses supported generally the case made by the answer. On the part of the Plaintiff, evidence was given of statements by the intestate importing that he intended that there should be an equal division of his property amongst his widow and his two children.

Argument.

Glasse, Q.C., and *Russell Roberts*, for the Plaintiff:—

The question is, whether there was anything which amounted to more than a permission to occupy the house during the testator's lifetime. If all took place exactly as stated in the answer, there is nothing amounting to a contract to give the house. It is not like handing over anything which passes by delivery, and the possession is quite consistent with the hypothesis that he allowed the occupation during his lifetime only, and intended that there

should be an equal division at his death. There are wanting here the two elements on which *Surcome* v. *Pinniger* (1) was chiefly decided, namely, the direction to the tenants to pay the rents to the husband, and the delivery of the title-deeds to him. The marriage is of itself no part performance which could support a parol agreement: *Caton* v. *Caton* (2). A possession to take a case out of the *Statute of Frauds* must be one by which the position of the parties is affected: *Coles* v. *Pilkington* (3). The mere fact of the marriage having taken place does not improve Mrs. *Kendall's* position: *Warden* v. *Jones* (4).

Argument.

J. Pearson, Q.C., and *Speed*, for Mr. and Mrs. *Kendall*:—

The allegations of the answer have been completely established by the evidence, and the case has been brought completely within *Surcome* v. *Pinniger*. It will follow that the gift carries with it the right to have the £110 paid out of the intestate's estate. A gift of a house means one free from incumbrances. An agreement to sell *Blackacre* means to sell it free from debt, and this is really a contract for valuable consideration. If there were any doubt as to the intestate's intention, it would be set at rest by his acts. He paid all the instalments which fell due during his lifetime, and would have paid the £110 if he had lived. The proper direction will be to have the house assigned to a trustee for the separate use of Mrs. *Kendall*.

E. B. Michell, for the widow.

Glasse, in reply.

MALINS, V.C.:—

Judgment.

This is a litigation which is most unfortunate for the parties, involving, as it does, a very small amount in value, but raising questions of the utmost importance in point of law and to the interests of society. The value of the property in question is not more than £400, but I have to decide a question partly of law and partly of fact, and I will first deal with the law. Assuming that

(1) 3 D. M. & G. 571.
(2) Law Rep. 2 H. L. 127.
(3) Law Rep. 19 Eq. 174.
(4) 23 Beav. 487.

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the intestate did, upon or in contemplation of the marriage of his daughter, say to her or her intended husband, "Upon your marriage I will give you a leasehold house," and that in pursuance of that intention he bought the house now in question, it is undisputed that on the very day of the marriage the husband and wife were put in possession of the house. They, in fact, slept there the first night of their marriage, and it is distinctly proved that they have resided there ever since. The case is therefore one of a verbal promise, followed by part performance by putting the parties into possession.

Now, under these circumstances, what is the law? The *Statute of Frauds* renders all promises in consideration of marriage void unless they are in writing, and I must say in this case, as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance, so as to take parol contracts out of the statute. But at all events that is thoroughly settled, and in this case, if Mr. *Ungley* had simply said to his daughter, "I have bought this house, and intend to give it to you on your marriage," that promise would have been absolutely void as being a parol agreement, of which marriage is not part performance. But a promise, followed by possession, is taken out of the operation of the statute, and assuming the promise to have been made in this case, it has been followed by putting the parties to whom it was made into possession. The case is analogous to that of a landlord and tenant between whom agreements for tenancies exceeding three years are void if not in writing, but where there is a verbal agreement for three years or more, and the tenant is put in possession, the mere fact of his entering into possession without doing anything more is part performance, and takes the case out of the *Statute of Frauds*, and the tenant who has entered into possession is in just as good a situation in proving the agreement as if it had been in writing.

I should say, therefore, that if *A.* is about to marry, and proves a promise on behalf of the intended wife's father that he will give him a house on his marriage, that is a void contract, because it is not in writing; but if that promise is followed upon the marriage by possession, that simple fact, if it be for an hour only, ought, in

my opinion, as being a part performance of the promise, to take the case out of the *Statute of Frauds*, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father saying that, "in consideration of the marriage, I will give or settle upon you a house." That would have been my opinion on principle, if the case had come before me without authority, but I am relieved of all difficulty. The principle has been settled by the decision of Sir *John Stuart* in *Surcome* v. *Pinniger* (1), affirmed by those two eminent Judges Lords Justices *Knight Bruce* and *Turner* on appeal, after the most thorough consideration.

Now, assuming the facts of this case to be proved, *Surcome* v. *Pinniger* is in some respects rather stronger than this. There Mr. *Alwyn* told Mr. *Chatteris* that he was entitled to some leasehold premises in *Serle Street*, and that he would give them to his daughter on her marriage. That was, of course, mere word of mouth, and if nothing more had taken place it would have been a mere word contract, and the house would have remained the property of Mr. *Alwyn*. Then the marriage took place in March, the promise having been made in January, and soon afterwards Mr. *Alwyn* gave up possession of the house to Mr. *Chatteris*, and Mr. *Chatteris* resided in the house for some time, and received the rent for it when he did not occupy it, as if it was his own. Mr. *Alwyn* also delivered up the title-deeds of the house to him, and he spent money upon it. Therefore there were two circumstances which do not exist in this case, namely, expenditure on the property and delivery of the title-deeds. But it is, to my mind, perfectly clear that the only act of part performance of the contract which was relied upon by the Lords Justices was the entering into possession, and therefore the decision was that, although the contract without the entering into possession was *nudum pactum*, Mr. *Chatteris* was by that act put in the same position as if he had a contract in writing. In that case, as in this, it was sought to treat the contract as a mere nullity, and to say that the property remained the property of Mr. *Alwyn* and passed to his personal representative. The attempt entirely failed, and the bill was dismissed with costs, and the Court, in order to mark their disapprobation

(1) 3 D. M. & G. 571.

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of the course which he had taken, refused to allow the costs to be paid out of the estate. Lord Justice *Knight Bruce* says: "We do not intend that the administrator shall be allowed costs out of the estate. We give the costs against him personally."

[His Lordship then commented on the evidence, and held that as a fact the promise to give the house in consideration of the marriage was made out. He then added:—]

Mrs. *Kendall* must, therefore, have her title perfected by a legal assignment. Only one question remains, which is, whether she is entitled to have the £110 paid out of the intestate's estate. It is admitted that if a man enters into a written agreement in the words "I agree to sell *Blackacre*," the meaning is that he agrees to sell it free from incumbrances. This would be so in the case of a written agreement. But a parol agreement perfected by possession is in the same position as a written agreement. I must, therefore, take this as if it had been a written agreement to give the house. The consequence will be that Mrs. *Kendall* will take the leasehold house, and that the £110 must be paid out of the intestate's personal estate.

Solicitors: *Rooks, Kenrick, & Co.; Henry Kelly.*

V.-C. M. 1876 *Nov.* 16.

CARGILL *v.* BOWER.

[1875 C. 42a.]

Practice—Amendment of Defence—Affidavit—Rules of Court, 1875, *Order* XXVII., *r.* 1—*Costs.*

A Defendant who has put in a joint defence will be allowed, under Order XXVII. r. 1 of the Rules of Court, 1875, to put in a separate and amended statement alleging new grounds of defence, without any affidavit as to the nature of the new defence; but will be ordered to pay the costs rendered necessary by not having put in such defence at an earlier period, subject however to such directions as the Court may think fit to give where it sees that unnecessary or oppressive costs have been incurred by the Plaintiff in opposing the application.

Statement.

THIS was a motion on behalf of one of the Defendants, *Thomas A. Hanson*, that he might be at liberty to amend the joint statement of defence delivered on his behalf along with the other

co-Defendants in the action on the 30th of June, 1876, so far as each statement of defence related to this Defendant; or to deliver a fresh or supplemental statement of defence on his own sole behalf in the said action.

Statement.

The action was commenced in November, 1875, and the statement of claim was delivered on the 3rd of April, 1876. The Plaintiff claimed that the Defendants, who were directors of the *British Imperial Insurance Corporation*, were jointly and severally liable to repay to the Plaintiff a sum of money paid by him under the circumstances mentioned, and to indemnify him against all further liability on the shares held by him in the company.

The Defendants put in a joint statement of defence on the 1st of August, 1876. Since then the Defendant *T. A. Hanson*, who was formerly a director of the company, had employed a separate solicitor, who considered that he had additional grounds of defence, in consequence of which he was desirous of putting in a separate and amended statement of defence.

Argument.

Locock Webb, Q.C., and *Brett*, in support of the motion:—

This is an application under Order XXVII., rule 1, of the Rules of Court, 1875, for leave to file a separate and amended statement of defence. The Defendant, having employed a separate solicitor, is advised that he has additional grounds of defence separate from the other co-Defendants. In *Budding* v. *Murdoch* (1) leave was given at the hearing to amend a bill so as to raise an entirely new case; and in *King* v. *Corke* (2), *Caldwell* v. *Pagham Harbour Reclamation Company* (3), and *Roe* v. *Davies* (4), leave was also given to the Plaintiff to amend at the hearing. This case not having arrived at the hearing is much stronger than those.

Glasse, Q.C., *Higgins*, Q.C., and *Grosvenor Woods*, for the Plaintiff:—

Under the old practice no amendment was allowed unless the Court was satisfied by an affidavit stating the object and nature of the amendments, that such amendments were necessary. The only affidavit in support of this motion is by the solicitor stating

(1) 1 Ch. D. 42.
(2) Ibid. 57.
(3) 2 Ch. D. 221.
(4) Ibid. 729.

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the reason for an application to amend, which is only a change of solicitors. The new Orders, by omitting any reference to the old practice, leaves the former rule as it was, and the present motion ought to be refused. The cases cited were all cases at the hearing, when the Court had had an opportunity of knowing what the amendments would consist of.

Under any circumstances this application cannot be acceded to, except upon payment of costs.

Rigby, for the other Defendants.

Locock Webb:—

In three of the cases cited the costs were reserved. The Defendant should not, therefore, be ordered to pay them.

Judgment.

MALINS, V.C.:—

The old practice has been referred to which put in the way of both the Plaintiff and Defendant so much difficulty in amending the pleadings that it was always productive of great injustice. In order to remove that difficulty the new rules have entirely altered the practice, and Order XXVII., rule 1, provides that "the Court or a Judge may at any stage of the proceedings allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties."

The case before me is one in which a gentleman who is one of the Defendants to a suit put in a joint defence, and since he put in that defence he has consulted another solicitor, and the new solicitor says there are omissions of several important grounds of defence. Now it is clear that there may be omissions made by a solicitor in putting in a defence which the client, who is ignorant of the law, may not have been able to detect, and surely the mistake of a solicitor should not deprive him of putting in a new defence when another solicitor has discovered the omissions in the

V.-C. M. 1876 CARGILL v. BOWER. Judgment.

first defence within due time before the hearing of the action. I see no possible harm which can arise from allowing the amendment to be made. The Plaintiff will know what the new defence is, and will have sufficient opportunity of meeting it. Order XXVII. makes no mention of any affidavit being required to shew the nature of the new defence, and without such an affidavit being required I should certainly not think it necessary. It appears to me that the present application is reasonable and proper, and quite within the rule, and I think, therefore, that the Defendant ought to have liberty to put in a statement raising new grounds of defence.

Upon the question of costs, I think that the Defendant should indemnify the Plaintiff against any reasonable costs which he has rendered necessary in consequence of not having put forward his full defence at an earlier period; but as to the amount of costs, it has always been the habit of the Court, where it sees that any undue expenses have been caused, to give such directions as it may think fit with regard to costs, although it is true that, as a general rule, the costs are left to the Taxing Master. In this case I can see no ground whatever for the Plaintiff having instructed two Queen's Counsel and a junior upon such an application as this. I shall, therefore, direct that the costs of one counsel only shall be allowed, and that may be either a senior or junior brief, as the Plaintiff thinks fit.

With regard to the costs of the other Defendants who have appeared, I think no objection should have been raised by them to such an application as this; at all events a consent brief would have been sufficient. I shall, therefore, allow them 40*s.* only for costs.

Solicitors for Defendant: *Stokes, Saunders, & Stokes.*
Solicitor for Plaintiff: *J. V. Musgrave.*
Solicitors for other Defendants: *Roberts & Barlow.*

V.-C. B.

1876

Nov. 11.

MANSFIELD *v.* CHILDERHOUSE.

[1876 M. 159.]

Specific Performance—Purchase by Trustees—Interrogatories by Vendor—Rules of Court, 1875, *Order* XXXI., *r.* 5.

In an action for specific performance of an agreement to sell the remainder of an underlease of house property to Plaintiffs, who were trustees for a married woman, interrogatories by the Defendant, who had notice that they were trustees, but no notice of the actual trusts, for the purpose of establishing that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be struck out as irrelevant.

Statement.

THIS was an application by adjourned summons on behalf of the Plaintiffs that certain interrogatories delivered by the Defendant might be struck out.

By their statement of claim the Plaintiffs claimed specific performance of an agreement of the 26th of April, 1876, by which the Defendant, *Sarah Childerhouse*, by her agent, *George Woods*, agreed to sell to the Plaintiffs the unexpired remainder (for six and a half years) of the lease of a house in *St. John's Wood*, which was held at a ground rent of £12 per annum. It was stated (par. 5) that the Plaintiffs were trustees for *Emily Cuno*, who subsequently to the signing of the said agreement had several interviews with the Defendant, during which she (the Defendant) admitted that *George Woods* was authorized to sign the same on her behalf, and expressed her satisfaction at the terms thereof.

In an affidavit filed in the action upon a motion to dismiss for want of prosecution, before any pleadings had been delivered, *Emily Cuno* deposed as follows: "Being desirous that the trustees of my marriage settlement should purchase a house for me in the vicinity of *St. John's Wood*, I made inquiries concerning a leasehold house No. 32A, *Marlborough Hill, St. John's Wood*, which was in the hands of a Mr. *George Woods*, house agent, for sale . . . and instructed my solicitors to negotiate with the said Mr. *Woods* for the purchase thereof, after consulting my trustees. I am informed and believe that a contract in writing, dated the 21st of April last, was entered into by or on behalf of my trustees, and

by the said Mr. *Woods*, on behalf of the vendor, for the purchase of the said house for the sum of £1200; and a deposit of £120 was paid into Mr. *Woods*' hands."

The statement of defence stated that *George Woods* was an auctioneer and house agent, and that he was authorized by the Defendant to find a purchaser for her of the house in question, but not to enter into any contract for the sale thereof; that the Defendant, in fact, held the house as administratrix of the late owner by an indenture of underlease; and it also stated (par. 7) as follows: "The Defendant does not admit that the Plaintiffs are trustees for the said *Emily Cuno*. The Defendant has been informed and believes that they are trustees, but she does not know upon what trusts they hold the money they propose to apply in payment of the purchase-money for the said messuage, or whether the trusts upon which they hold the same authorize the expenditure of the trust estate in the purchase of property held by way of underlease, and the Defendant submits that if the said trusts do not authorize such expenditure, this action should for that reason (if for no other) be dismissed with costs. The Defendant afterwards filed the following interrogatories for the examination of the Plaintiffs:—

1. Are not the Plaintiffs trustees for one *Emily Cuno*, and whether or not for some other and what person or persons? Do they not intend or propose to apply the trust funds of which they are such trustees in the payment of the purchase-money of £1200 in the statement of claim mentioned, or how otherwise?

2. Are not the trusts upon which the said trust funds are held declared by some, and what instruments in writing? Let the Plaintiffs set forth the date and the parties to and the short purport and effect of the said instrument or declaration of trust.

3. Is it not a breach of trust to apply the said trust funds in the purchase of premises held by way of underlease, or how do the Plaintiffs make out the contrary?

4. In whose custody is the said instrument or declaration of trust?

The Plaintiffs applied by summons under Rules of Court, 1875, Order XXXI., to strike out these interrogatories on the ground that they were irrelevant, not put *bonâ fide* for the purposes of the

V.-C. B. 1876 MANSFIELD v. CHILDER-HOUSE.

action, and that the matter inquired after was not material at this stage of the action.

Argument.

Chester, in support of the application :—

The Defendant is not at liberty to shew that we were guilty of a breach of trust in entering into the contract with her, as in any case it cannot affect her. Even if she would be implicated in the supposed breach of trust by taking the money with notice that we had not power to make such an investment, a mere reference to the Plaintiffs as trustees, which is all there is here, would not be such notice. The interrogatories are therefore irrelevant, and as it appears plainly from the other defence raised that they are not put *bonâ fide* for the purpose of the action, they ought to be struck out.

Method, for the Defendant, contended that *primâ facie* it was improper for trustees of a marriage settlement to invest in an underlease, which might be forfeited by the default of the superior lessor. The vendor, who has received notice that she is dealing with trustees, is put upon inquiry, and may become liable to see that the purchase-money is properly applied: *Lewin* on Trusts (1); *Bridgman* v. *Gill* (2); *Malpas* v. *Ackland* (3); *Jones* v. *Smith* (4).

Judgment.

BACON, V.C.:—

There is no shadow of a reason for filing these interrogatories. The simple question in the action is whether there is a binding agreement, and that being so, it would, in my opinion, be an abuse to permit such interrogatories as these to be delivered. One great object of the new procedure was to guard against anything like chicanery, or the introduction into pleadings of anything which would delay or hinder the progress of justice. To allow these interrogatories would be to create delay and encourage sharp practice against the plain intention of the Act. They are wholly irrelevant to the question in the action, and I have no hesitation in ordering them to be struck out.

Solicitors: *Leathes & Maynard; Johnson & Master.*

(1) Page 441.
(2) 24 Beav. 302.
(3) 3 Russ. 273.
(4) 1 Hare, 43.

TEASDALE *v.* BRAITHWAITE.

V.-C. B.

1876

Nov. 17.

[1875 T. 68.]

Husband and Wife—Post-nuptial Settlement supported against subsequent Purchaser for Value.

Real estate having been devised to an unmarried woman with an expression of wish that, in case she should marry, she should before marrying settle the same estate for her own separate use for life, and to such uses as she should by will, and notwithstanding coverture, appoint, the devisee married, and about a year after the marriage, a child having been born, the husband and wife joined in a deed, acknowledged by the latter, purporting to be executed to give effect to the testator's wish, whereby the land was conveyed to trustees, upon trust for the wife for life, remainder for the husband for life, remainder to the children as the husband and wife should jointly by deed, or as the survivor should by deed or will appoint; and, in default, to the children absolutely; and if no children, to the wife in fee, if she survived the husband; if not, to the wife's brothers absolutely:—

Subsequently the husband and wife, by acknowledged deed, mortgaged the property without notice of the settlement:—

Held, that the settlement was for valuable consideration, and not void as against the mortgagee, under the statute of 27 Eliz. c. 4.

Hewison v. *Negus* (1) followed.

CAUSE.

Statement.

James Shepherd, by his will, dated the 19th day of February, 1857, devised, *inter alia*, as follows:—

"I give and devise my messuage tenement and estate situate at *Ouseby Hole*, in the said parish of *Ouseby*, with the lands, grounds, and appurtenances thereunto belonging, unto my daughter *Mary Shepherd*, her heirs and assigns for ever. . . . And I declare it to be my wish that, in case my said daughter shall marry, that she shall before marrying settle the same estate for her own separate use for life, independent of her husband, and to such uses as she shall by her will, and notwithstanding her coverture, appoint."

Testator died on the 6th of July, 1861.

On the 10th of October, 1861, the testator's daughter *Mary*

(1) 16 Beav. 594.

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Statement.

married *Robert Forrester*, and before the next mentioned date a child was born of the marriage.

By an indenture dated the 7th of October, 1862, and made between *Robert Forrester* and *Mary* his wife, thereinafter mentioned as the said settlors, of the one part, and *Abraham Braithwaite* and *Thomas Forrester*, thereinafter called the said trustees, of the other part, and duly acknowledged by *Mary Forrester*, after reciting the particulars of the freehold hereditaments devised by the will, and of certain subsequent accretions thereto, all of which were the property of the wife; that no settlement was executed on the occasion of the marriage; that *Mary Forrester* became entitled to the said hereditaments under the will of her father, who by the said will expressed his wish that the said hereditaments should be settled for the separate use of the said *Mary* in case of and prior to her marriage; and that the settlement now in statement was executed to give effect to the said wish, as the said settlors respectively thereby declared; it was by the indenture now in statement witnessed, that, in pursuance of the said agreement, and in consideration of the said marriage, the said settlors did, and each of them did by the deed now being stated, grant and release unto the said trustees and their heirs the said hereditaments with the appurtenances, and all the estate, interest, property, claim, and demand whatsoever, both at law and in equity, of the said settlors, and each of them therein or thereto, to hold the said premises unto the said trustees, their heirs and assigns for ever, to the use of the said trustees and their heirs during the life of the said *Mary Forrester*, upon trust during her life to permit her to receive the annual rents and profits thereof for her sole and separate use, free from the control, debts, or engagements of the said *Robert Forrester*, or any future husband of hers, and so that the said *Mary Forrester* should have no power to anticipate the said rents and profits; and after her decease, in case the said *R. Forrester* survived her, to the use of the said *R. Forrester* and his assigns for life, without impeachment of waste; and after the decease of the survivor of the said settlors, upon trust for the children and child of the marriage who should attain twenty-one or marry, if more than one in equal shares, subject to an exclusive power of appointment amongst the children, reserved to

the husband and wife by deed jointly, and to the survivor by deed or will; and it was declared, if there should be no child who should attain a vested interest, that if *Mary Forrester* should survive, the trustees should stand seised of the hereditaments to the use of *Mary Forrester*, her heirs and assigns; and if *Robert Forrester* should survive, then, subject to his life estate, the trustees should stand seised of the hereditaments to the use of *Joseph Shepherd* and *James Shepherd*, brothers of *Mary Forrester*, and their heirs and assigns, as tenants in common, absolutely.

In the year 1865 *Robert Forrester* borrowed £800 of *George Teasdale*, without disclosing the settlement, and by an indenture dated the 14th of February, 1865, expressed to be made between *Robert Forrester* and *Mary* his wife of the one part, and *George Teasdale* of the other part, and which was also duly acknowledged by *Mary Forrester*, after reciting that *R. Forrester* and *Mary* his wife, in her right, were duly seised of or well entitled to the fee simple and inheritance in possession, free from incumbrances, of the above-mentioned freehold tenements, in consideration of the sum of £800 purported to be paid to *R. Forrester* and *Mary* his wife, the said hereditaments were purported to be granted and disposed of by *R. Forrester* and *Mary* his wife respectively to the use of *George Teasdale* and his heirs by way of mortgage to secure repayment of the £800 and interest.

Some of the deeds were handed over, but all mention of the settlement was suppressed.

A further mortgage of the same hereditaments to secure a further sum of £600 was, on the 14th of February, 1872, executed by *Robert Forrester* and *Mary* his wife to the same *George Teasdale;* and this deed also was duly acknowledged.

On the 22nd of October, 1874, *Robert Forrester* was adjudicated a bankrupt, and *John Kidd* was appointed his trustee in bankruptcy.

There were now four children of the marriage, all infants.

In the course of the year 1874 the mortgagee discovered the fact of the execution of the settlement; and on the 25th of May, 1875, this bill was filed by *George Teasdale* against the trustees of the settlement, *John Kidd, Robert Forrester* and *Mary* his wife, and their children, charging that the settlement was not (except

V.-C. B. 1876 TEASDALE v. BRAITHWAITE. Statement.

to the extent of the limitation in trust for the separate use of *Mary Forrester*) made in pursuance of any direction entered in or condition imposed by the will, and that the will contained no restraint upon anticipation; also that no consideration was given for the settlement, and that the same, except so far as it was made in pursuance of the directions contained in the will, was voluntary, and as against the Plaintiff fraudulent and void under the statute of the 27 Eliz. c. 4.

The bill prayed for a declaration that the settlement of the 7th of October, 1862, except only to the extent of the limitation therein contained in trust for the separate use of the Defendant *Mary Forrester* during her life, was void as against the Plaintiff, his heirs, executors, administrators, and assigns, claiming under the said mortgage and further charge; and other relief.

The Defendants the trustees by their answer denied that it was the fact that no consideration was given or paid for the settlement, or that the same (except as above charged) was altogether voluntary. They submitted that the settlement ought not, as against the Plaintiff, to be deemed fraudulent and void under the statute, and that the valuable consideration for the execution of the deed was set forth and appeared therein.

Robert and *Mary Forrester* answered to the like effect.

John Kidd, the trustee in bankruptcy, disclaimed, and had been dismissed.

The wife's brothers had also disclaimed by writing.

Argument.

Shebbeare (*Kay*, Q.C., with him), for the Plaintiff:—

The only fetter imposed by the will upon *Mary Shepherd's* enjoyment of the estate in fee, was the direction that if she should marry the estate should be settled by her to her separate use for life; nothing was said about any restraint upon anticipation, nor was there any direction to settle on her children. Hence these two last-named limitations in the settlement were voluntary, and void as against a purchaser for value.

Whether the Plaintiff had notice or not is immaterial; but as a matter of fact, he had no notice; and a gross fraud has been perpetrated on him. It is equally immaterial that the settlement was proper, provident, or such as the Court would approve.

The intention of the testator seems to have been to enlarge rather than to restrain his daughter's power, and the intention, as recited in the settlement, was, not to carry out any bargain between the parties, but to give effect to "the said wish." Nothing is said in the will about children; they, at least, are volunteers.

In *Magrath* v. *Morehead* (1), where a testator gave shares to his daughters, "to be settled on themselves at their marriage," it was held there was no trust in favour of children.

Where land was by a will directed to be settled on daughters and their issue, upon trusts which did not exhaust the fee, it was held that the Court was not authorized to direct a settlement whereby the ultimate fee was limited in moieties to the appointment of the daughters: *Head* v. *Godlee* (2). So here the testator's direction has no effect on the reversion subject to the wife's separate estate during coverture.

Sir *H. Jackson*, Q.C., and *W. W. Cooper*, for the Defendants, the trustees, the wife, and the children:—

No doubt there has been hardship on the Plaintiff; but the question for the Court is, was value given for the settlement of October, 1862? We say that whether the words in the will amount to a binding trust, or are precatory only, value was given. The true construction we assert to be, that no binding trust was impressed on the wife's freehold by the precatory words: *Ex parte Payne* (3).

The case, then, being free from any question of impressed trust under the will, how does it stand? The husband postponed his estate by the curtesy, giving his wife the first life estate. The wife made a provision for the children of the marriage. Thus they both modified their existing interests: and such a modification as this, had it been on the part of the husband alone, would have been sufficient to raise a valuable consideration: *Hewison* v. *Negus* (4), which was not appealed from or disturbed on this point by the Court of Appeal (5), and has been followed by *Atkinson* v. *Smith* (6).

(1) Law Rep. 12 Eq. 491.
(2) Joh. 536.
(3) 2 Y. & C. Ex. 636.
(4) 16 Beav. 594.
(5) 16 Beav. 600, n.; 17 Jur. 567.
(6) 3 De G. & J. 186.

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If the Court should have power, and be disposed upon this record, to make an order affecting the husband's reversionary life interest, we shall not oppose, provided the Plaintiff pays our costs.

As to the restraint upon alienation by the wife, if the deed be valid, it is clear; and even under the will, if the declaration of wish be a binding trust, it will be executed by the Court by adding a clause of restraint. Restraint upon anticipation is incidental to separate use: *Stanley* v. *Jackman* (1); *Loch* v. *Bagley* (2).

Upon the question of value we say, as was said in *Parker* v. *Carter* (3), that the concurrence of both husband and wife was necessary to the deed, and that the consent of each to the alteration made by that deed was a valuable consideration to support it in favour of the other. Nor will the Court enter into the *quantum* of consideration: *Townend* v. *Toker* (4); it will "anxiously lay hold of any circumstances constituting a consideration moving from the grantee to the grantor, to take a case out of the category of voluntary settlements": *Rosher* v. *Williams* (5).

"Where the husband parts by the settlement with an interest in his marital right in the estate in favour of his wife, the settlement would be for valuable consideration": *Sug.* Vendors and Purchasers (6); *Turnley* v. *Hooper* (7).

Shebbeare, in reply.

Judgment.

BACON, V.C.:—

I must say, reluctantly, as one always must be reluctant in a case of fraud like this, that I am bound by the decision in *Hewison* v. *Negus* (8) and the cases which have followed it.

It is settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration.

(1) 23 Beav. 450, 456.
(2) Law Rep. 4 Eq. 122.
(3) 4 Hare, 400, 409.
(4) Law Rep. 1 Ch. 446, 458.
(5) Law Rep. 20 Eq. 210, 218.
(6) 13th Ed. chap. xxii. sec. 1, pl. 8.
(7) 3 Sm. & Giff. 349.
(8) 16 Beav. 594.

With regard to the testator's will, what the wife was not obliged to do, she was free to do of her own will. It was perfectly voluntary for her to execute the settlement, or to enter into the bargain which is expressed in the settlement; but if such a settlement be made on a contract between husband and wife, that cannot be called a transaction without valuable consideration. The settlement provides for an interest for life for the husband after the death of the wife, which would be as valuable, for anything I know, as his tenancy by the curtesy. The husband and wife were free to settle that bargain between themselves; and in the absence of fraud (and there is no suggestion of fraud as far as the settlement is concerned) they have made that bargain. Whatever they may have agreed to do, there is a good deed which carried the agreement into effect, and it is for valuable consideration. It is only when a settlement is not for valuable consideration, but voluntary, that the statute of *Elizabeth* applies.

Then, according to the decision in *Hewison* v. *Negus* (1), that if there be a valid bargain between husband and wife, it amounts to a valuable consideration to each of them, the case is taken out of the statute, and this settlement is a valid settlement, although the suppression of it was an act of fraud.

The trustees must have their costs; but I think no one else can have costs. The bill will be dismissed; the trustees' costs to be paid by the Plaintiff; and there will be no other order as to costs.

That will not prejudice the Plaintiff's right against the estate of the husband, as to which the trustee in bankruptcy has disclaimed, including in that estate his reversionary life estate expectant on his surviving his wife.

Solicitors for Plaintiff: *Johnston & Harrison*, agents for *Harrison & Little, Penrith.*

Solicitor for Defendants: *J. L. Morris*, agent for *W. B. & C. N. Arnison, Penrith.*

(1) 16 Beav. 594. 17 Jur. 446.

V.-C. H.
1876
Nov. 6.

ORR *v.* DIAPER.

[1876 O. 14.]

Trade-marks—Piracy—Discovery Action—Shippers.

An action will lie against shipowners who have shipped goods bearing counterfeits of Plaintiff's trade-marks for discovery of the names of the consignor from whom the goods were received.

Statement.

DEMURRER.

The Plaintiffs had for many years carried on, under the firm of *R. F. & J. Alexander & Co.*, the business of sewing cotton and thread manufacturers, and sold the same both for home and certain foreign markets, including *Valparaiso*. The cottons and threads were made up for sale in different coloured papers, and certain tickets, specially designed, were used to distinguish them from the cottons and threads of other manufacturers. During the summer of 1874 the Plaintiffs discovered that considerable quantities of sewing cotton of an inferior quality were being sold in foreign markets, and especially in *Valparaiso*, packed in the same manner as, and bearing tickets purposely designed in imitation of, their own. The Defendants carried on an extensive business as shippers at *Liverpool*, and the Plaintiffs, previously to the 10th of April, 1876, ascertained that they had been for some time shipping cotton thread to *Valparaiso* and elsewhere, packed in the same manner as their own and bearing counterfeit tickets; and thereupon their solicitors wrote to the Defendants, inquiring for the name of the person from whom they received those goods, and on whose behalf they were shipped. On the 4th of May the Defendants' solicitors replied to the effect that in the absence of more definite information than that contained in that letter they were unable to give the particulars required, and added, "We therefore have to ask you to be good enough to inform us to what shipments you refer, stating the ship, the consignees, and the date of the shipments, and if our clients can give you the information you require, we shall advise them to do so."

On the 5th of May, 1876, the Plaintiffs' solicitors, after stating in a letter to the Defendants' solicitors that they had ascertained that the goods had been shipped through Messrs. *Diaper & Co.*, said: "Our clients can quite understand that Messrs. *Diaper* are innocent of any intention to act prejudicially to them, and if they are prepared to give us the names and addresses of all persons and firms from whom they have received cotton thread for shipment to *Valparaiso* within the last two years, the necessity for further proceedings may cease. Our clients have discovered one of the offenders, and he shipped through Messrs. *Diaper*, and we know that there are other persons shipping through the same firm, but as yet we have failed to discover their names. We shall be glad to hear that Messrs. *Diaper* are willing to comply with our very reasonable request." No reply was sent to that letter. The statement of claim contained allegations that the Defendants had during the last two years received for shipment and shipped cotton thread for *Valparaiso* and elsewhere packed in the same manner as the Plaintiffs' and bearing counterfeit tickets; that the business of the Plaintiffs was being considerably injured; and that the Defendants well knew the tickets, and of the injury; and that they ought to set forth the names and addresses of the persons and firms consigning cotton thread to the Defendants to be by them shipped with such counterfeit tickets, the exact particulars and amounts of the cotton thread so shipped, the exact dates and when the same were shipped; further, that the discovery sought in this action was sought in aid of proceedings in contemplation by the Plaintiffs to restrain the piracy of their tickets; that the proceedings contemplated could not be maintained without the discovery sought; and prayed that the Defendants might make a full and complete discovery of the matters thereinbefore stated. The Defendants filed a demurrer, which was to the effect that the statement of claim was bad in law on the ground that they had not such an interest in the matters alleged in it as to entitle the Plaintiffs to discovery from them upon this subject, they being liable to be examined as witnesses in any proceedings which the Plaintiffs might have in contemplation, as in the statement of claim alleged, and on other grounds sufficient in law to sustain the demurrer.

V.-C. H. 1876 ORR v. DIAPER. Argument.

Dickinson, Q.C., and *Ingle Joyce*, for the Defendants:—

This is a proceeding for discovery against persons who will not, and who are not, intended to be parties in an action. As against them, it is not suggested either in this, or that there can be in any future statement of claim any relief prayed. The discovery is sought from agents who may, if required, be able to give evidence in an action. The Plaintiffs do not state that it is in contemplation to commence any proceedings against the Defendants. Nor is there any statement as to the persons against whom proceedings, if any, are to be commenced, unless it can be inferred that they are to be commenced against the one offender, to whom reference is made in the letter of the 5th of May; or some other offenders whose names they may discover. But under no circumstances can any relief be prayed against the Defendants, as no case is stated against them which entitles the Plaintiffs to relief. If there were a prayer for relief the claim would clearly be demurrable, and that being so, there can be no right to discovery. Under the old system it may have been stated that there was an intention to commence an action at law, and that the discovery was sought in aid of such action, *i.e.*, "the discovery sought must be material either to the relief prayed by the bill or to some other suit actually instituted or capable of being instituted": *Mitford* on Pleadings (1). There is no matter in dispute between the present parties. There is no allegation or suggestion that the Plaintiffs are entitled to sue the Defendants in this or in some other Court, nor that these parties are involved in litigation or liable to be so. But, on the contrary, there is a statement that there will be litigation against the persons (when discovered) whose acts are complained of. The Defendants do not hold a representative position. If they did the Plaintiffs would be justified in seeking discovery from them. The decision in *Dixon* v. *Enoch* (2) clearly shews that unless there be express statutable authority, a person who is not to be a Defendant in an action cannot be compelled to give discovery.

[HALL, V.C.:—Would not a few words—that the Plaintiffs intend to make the Defendants parties—obviate that difficulty?]

(1) 5th Ed. p. 226. (2) Law Rep. 13 Eq. 394.

V.-C. H. 1876 ORR v. DIAPER. Argument.

In that case they must pray for some relief. At present there is no allegation of an intention to sue: nor is there anything which shews that the Plaintiffs are entitled to sue the Defendants. The Plaintiffs propose to sue persons not for carrying their goods, but for using their trade-marks. The statement of claim, therefore, is liable to a demurrer, because it is not against persons who are being, or who are intended to be sued; and because the Defendants are persons against whom no right to sue has been shewn on the face of the claim, the demurrer ought therefore to be allowed.

[They referred to *Carver* v. *Pinto Leite* (1), *Queen of Portugal* v. *Glyn* (2), *Corporation of London* v. *Levy* (3), and *Mitford* on Pleadings (4).

W. Pearson, Q.C., and *Edmund S. Ford*, for the Plaintiffs, were not called upon.

Judgment.

HALL, V.C.:—

I am of opinion that this demurrer cannot be allowed. In the case of *Dixon* v. *Enoch* (5) Vice-Chancellor *Wickens* said: "The supposition that if the Plaintiff knows the name of one proprietor he can make him tell the names of all the others, but that not knowing one name he cannot get the information from the printer and publisher who is the agent of the proprietors, and is put forth to stand between them and the public, is one that does not commend itself to one's common sense, and is not to be accepted without absolute necessity." That is the view which I take in this case, and nothing but absolute necessity would compel me to allow this demurrer. The case is one in which the Plaintiffs, owners of certain trade-marks, have had their rights materially invaded. They do not know who the invaders are; but they know that these Defendants ship goods to *Valparaiso* and other foreign markets which bear on them marks which are counterfeits of the Plaintiffs'. The Plaintiffs applied to the Defendants to give them the names of the persons who shipped the goods

(1) Law Rep. 7 Ch. 90.
(2) 7 Cl. & F. 466.
(3) 8 Ves. 398, 405.
(4) 5th Ed. pp. 220, 221, 222.
(5) Law Rep. 13 Eq. 400.

V.-C. H. 1876 ORR v. DIAPER. Judgment.

with those counterfeit marks upon them. The Defendants would not give the names, but required more particulars. A correspondence took place, and legal proceedings were threatened if the information asked for in regard to the names and addresses of the persons for whom the goods complained of were shipped were not given. The Plaintiffs state that they seek discovery in aid of other proceedings, and for the Defendants it is contended that they cannot mean to take any proceedings against them, as they could do that without having the names of other persons. The Plaintiffs, however, want to bring their action against those persons for whom the Defendants have shipped goods with counterfeit marks. It has been submitted that the Defendants are mere witnesses; but their position, they being the actual shippers, is different from that of mere witnesses. I think that the Plaintiffs do shew a title to sue. *Dixon* v. *Enoch* (1) depended, no doubt, upon the construction of a statute, and the proceedings in that case were in their nature criminal. In *Carver* v. *Pinto Leite* (2) the discovery was limited to a particular purpose. It was limited because the Court will not allow discovery for other purposes, and if the Court sees that all fair and legitimate purposes will be answered by a restricted discovery, it will so restrict it. In this case the Plaintiffs do not know, and cannot discover, who the persons are who have invaded their rights, and who may be said to have abstracted their property. Their proceedings have come to a dead lock, and it would be a denial of justice if means could not be found in this Court to assist the Plaintiffs. The demurrer must be overruled with costs, and the Defendants must put in their answer in one month.

Solicitors: *Gregory & Co.*, agents for *Hull, Stone, & Fletcher, Liverpool; Pritchard, Englefield, & Co.*, agents for *Grundy & Kershaw, Manchester.*

(1) Law Rep. 13 Eq. 394. (2) Law Rep. 7 Ch. 90.

HULL *v.* HILL.

V.-C. H.

[1875 H. 31a.]

1876

Nov. 25.

Will—Construction—Bequest of Foreign Bonds—Colonial Bonds not included.

Bequest by a testatrix of "the foreign bonds, amounting to about £8000," which she had purchased:—

Held, that colonial bonds which formed part of the amount mentioned did not pass.

Statement.

THIS was an action for the administration of the estate of a testatrix, who in her will described herself as an Englishwoman, but who at the time of making it had no settled domicil. The testatrix by her will appointed executors, and bequeathed certain legacies, and by a codicil, made on the same day, she bequeathed "the foreign bonds, amounting to about £8000 in nominal value, purchased with the economies of my own marriage settlement," to a person named. At the date of the will and of her death the testatrix was possessed of about £7500 foreign and £500 Australian bonds. The question was, whether the colonial bonds passed under the description of "Foreign Bonds."

Dickinson, Q.C., and *D. Sturges*, for the Plaintiffs.

Eddis, Q.C., and *Phear*; *Hastings*, Q.C., and *Methold*; *W. Pearson*, Q.C., and *Kekewich*; and *Samuel Dickinson*, for the Defendants.

Judgment.

HALL, V.C.:—

In my opinion these bonds, which were issued by the colony of *New South Wales, Australia*, are not included in the gift of foreign bonds.

Solicitors: *Keighley & Gething*; *Few & Co.*; *Frederick Rolt.*

C. J. B.
1876
Nov. 6.

In re BRYANT.

Contempt of Court—Breach of Injunction—Notice by Telegram.

A sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a *fi. fa.* after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ:—

Held, that the sheriff's officer and the auctioneer had been guilty of contempt of Court, and that they must pay the costs of a motion to commit them.

Statement.

ON the 28th of July, 1876, a writ of *fi. fa.* for the sum of £54 7*s.* 6*d.* was issued out of the Common Pleas Division at the suit of *J. E. Walford* against *Thomas Bryant*, a trader, and on the 31st of July, *John Orridge*, an officer of the sheriff of *Hertfordshire*, seized the goods of *Bryant* in his dwelling-house at *Cheshunt*, and instructed *John Crawter*, an auctioneer, to proceed to a sale without delay. *Crawter* advertised the sale to take place on the 8th of August. On the 3rd of August *Orridge*, who resided at *Hertford*, wrote to *Crawter*, who resided at *Cheshunt*, that he had given too long a notice of sale, and that he had better try and fix an earlier day. On the same 3rd of August *Bryant* filed a liquidation petition in the *London* Bankruptcy Court, and a receiver of his property was appointed. Immediately after the filing of the petition his solicitors sent a letter to *Crawter*, giving him notice that the petition had been filed, and that application would be made at the sitting of the Court the next day (the 4th of August) to restrain further proceedings under the execution. A similar letter was sent to *Orridge*. *Crawter* received the letter sent to him on the morning of the 4th of August, but *Orridge* did not receive his letter until 4.30 P.M., it having been addressed to him by mistake at *Cheshunt* instead of *Hertford*. He had, however, in the morning been informed by *Crawter* of the letter which he had received. At the sitting of the Court on the morning of the 4th of August, upon the application of *Bryant* and the receiver, an order was made restraining the sheriff and *Walford*

from taking any further proceedings upon the judgment until after the 11th of August.

Soon after this order had been made *Bryant's* solicitors sent a telegram to *Orridge* as follows:—"*Walford* against *Bryant*. Injunction staying sale and further proceedings granted this morning. Order will be served as soon as possible." A similar telegram was sent to *Crawter*. *Orridge* received the telegram at *Hertford* about 1.15 P.M. The telegram sent to *Crawter* was received at his office at *Cheshunt* between 12 and 1 in the afternoon. Meanwhile it had been arranged between *Orridge* and *Crawter* that the sale should take place on the 4th of August instead of the 8th, and as *Crawter* was unable to conduct the sale himself on that day, he requested *James Death*, who had formerly been his partner, to conduct it for him. The telegram sent to *Crawter* was shewn to *Death* at 12.50 P.M. Notwithstanding this *Death* had the sale published by the public crier in *Cheshunt*, and commenced the sale shortly after 3 o'clock, and it was continued till 5.40, when the debtor himself arrived from *London* with an office copy of the restraining order, and thereupon the sale was stopped. But by that time the greater part of the goods had been sold.

Statement.

On the 7th of August the Chief Judge gave leave to serve a notice of motion for the 6th of November to commit *Orridge* and *Death* for contempt of Court in selling the goods. This notice was served, and the motion now came on to be heard.

Argument.

Finlay Knight, for the motion:—

It was incumbent on the Respondents to stop the sale as soon as they had knowledge from any reasonable source that the restraining order had been made. The notice by telegram was sufficient.

Lumley Smith, for the Respondents:—

There was no intention to commit any contempt of Court. The sheriff's officer was in a dilemma, for he feared that he should be liable to the execution creditor if he delayed the sale. But he instructed *Death* to stop the sale at once if he was served with any order of the Court. It is an important question whether a sheriff or his officer is bound to pay attention to anything but an actual order of the Court served upon him. A telegram might be sent

C. J. B. 1876 *In re* BRYANT.

by any unauthorized person, and might state what was untrue. In the present case the debtor had ample time to serve the order before the sale commenced. The evidence shews that there were several trains by which he could have reached *Cheshunt* before the sale began.

Judgment.

BACON, C.J. :—

This is a positively undefended case. There can be no kind of excuse for the conduct which the sheriff's officer has thought fit to pursue. He knew, or ought to have known, that after notice of an act of bankruptcy he should have suspended his proceedings. There was no urgency in the case; it was not incumbent on him to sell at once, and it is no reason for his selling to say that he incurred a liability to the execution creditor. It is perfectly clear that he knew that an act of bankruptcy had been committed, and he admits that a telegraphic communication had been made to him before the sale of the fact that an injunction to restrain the sale had been ordered by the Court. He and the auctioneer are both equally to blame. They both violated what they must have known to be the plain law, and proceeded to sell. What may have been the damage caused to the estate I have no means of knowing at present; but it is incumbent upon the Court to insist, for the sake of justice, and in regard to the rights of creditors, that when injunctions are granted they shall be obeyed. It is an admitted fact that an injunction had been granted, and that the sheriff's officer and the auctioneer after they knew this disregarded it, and proceeded to a sale. As soon as the sheriff's officer knew that an injunction had been applied for, or was about to be applied for (I do not say that he was bound to take any notice of the intention), without instructions from anybody, and without any risk to himself, he could have postponed the sale. But instead of this he chose, in violation of the law and in contempt of the Court, to proceed to a sale, thereby occasioning not only loss but considerable expense to the estate. I am willing to believe that he did not intend to commit a contempt of the Court, but I find that he did wilfully and with full knowledge disobey the order. I am not pressed to make an order for commitment, though that would be the proper thing to do. I am told that the money produced by

the sale is still in the sheriff's hands, and, upon his undertaking to pay it over to the trustee, I order that these two gentlemen do pay the costs of this application.

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Finlay Knight asked that an inquiry might be directed as to the damage occasioned to the estate by the sale.

BACON, C.J.:—

I cannot do that.

Solicitors: *Harper, Broad, & Battock; Paterson, Snow, & Burney.*

In re LEWER. *Ex parte* WILKES.

C. J. B. 1876 *Nov.* 13.

Trust Fund—Assignment—Notice—Priority—Trustee himself an Assignee.

A trustee who receives notice of an assignment of the trust fund made by the *cestui que trust* is not, in the absence of inquiry, bound to inform the person giving him the notice that he himself has a prior assignment. By omitting to give that information the trustee will not lose his priority.

Affirmed by Ap. Ct. 5 Ch. D. 61.

Statement.

THIS was an appeal from a decision of the Judge of the *East Stonehouse* County Court.

E. G. Lewer formerly carried on business in partnership with *G. P. Reed.* In 1875 *Reed* instituted a suit in the Court of Chancery against *Lewer* for dissolution of the partnership, and on the 15th of July, 1875, a decree for dissolution as from the 5th of July, 1875, was made. And it was also ordered that *W. W. Arliss* and *E. Wilkes* should be appointed joint receivers to collect and get in the outstanding debts, and to realize the other assets of the partnership, and it was ordered that (after payment of costs and the remuneration of the receivers) *Arliss* and *Wilkes* should pay the residue of the moneys to be received by them to *Reed* and *Lewer* according to their respective rights and interests under the partnership agreement.

Lewer afterwards carried on alone the business of a brewer at *Plymouth.* On the 6th of September, 1875, he, in order to

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secure to *Wilkes* a debt of £697 1*s.* 11*d.*, gave him the following order:—

"Sept. 6, 1875.

"To Messrs. *W. W. Arliss* and *Wilkes.*

"*Reed & Lewer* in Chancery.

"I hereby authorize you to pay to Mr. *Wilkes* the amount due to me for goods supplied in the above estate, for which his receipt will be a sufficient discharge.

"(Signed) *E. G. Lewer.*"

The signature was written across a receipt stamp. Notice of this order was given to *Arliss* on the 3rd of November, 1875.

On the 18th of September, 1875, *Lewer* signed in favour of Messrs. *Garrard & Bartram*, wine merchants, to whom he then owed a sum of more than £2000, the following order:—

"Sept. 18th, 1875.

"To Mr. *Edwin Wilkes.*

"*Reed & Lewer.*

"I hereby authorize and request you to pay the balance of money due to me for goods supplied in the above estate, which I estimate at between £500 and £600, to Messrs. *Garrard & Bartram*, whose receipt shall be sufficient discharge to you for the same.

"(Signed) *E. G. Lewer.*"

The signature was written across a receipt stamp.

The same day notice of this order was given to *Wilkes*, who signed the following acceptance of the notice:—

"18th Sept., 1875.

"I accept the above order and undertake to pay the balance collected by me in the above estate, and due to you for goods supplied, to Messrs. *Garrard & Bartram.* I estimate the balance at about £500.

"(Signed) *E. Wilkes,*

"Receiver."

The signature was written across a receipt stamp. This order, with the acceptance, was then sent by *Lewer* to *Garrard &*

Bartram. *Arliss* did not receive any notice of this order until the 3rd of March, 1876.

On the 16th of December *Wilkes*, with the assent of *Arliss*, appropriated £400, a part of the sum then in the hands of the receivers, to satisfy his own claim under the order of the 6th of September, 1875. After this there was not enough left to satisfy the claim of *Garrard & Bartram*.

Statement.

On the 4th of February, 1876, *Lewer* filed a liquidation petition. The creditors met, but passed no resolutions, and ultimately *Lewer* was adjudicated a bankrupt. *Arliss* was appointed trustee. *Garrard & Bartram* claimed to be entitled to be paid their charge in priority to that of *Wilkes*, and they applied to the County Court for an order declaring them entitled to the balance of moneys then in the hands of *Arliss* and *Wilkes* as receivers in the suit, or which had since the date of the order of the 18th of September, 1875, been received by *Arliss* and *Wilkes*, or either of them, or by *Arliss* as trustee, and for an order for payment accordingly, and also for an order that *Wilkes* should forthwith pay to *Garrard & Bartram* any moneys on account of such balance which he had received and applied to his own use since the 18th of September, 1875.

There was evidence that when the notice of *Garrard & Bartram's* charge was given to *Wilkes*, he told them nothing about his own prior charge. The Judge held that *Wilkes*, when he assented to the second charge in favour of *Garrard & Bartram*, ought to have informed them of his own prior charge, and that, as he had not done so, he had lost his priority. His Honour, therefore, ordered that the £400 (which had been previously paid into Court by *Wilkes*) should be paid out to *Garrard & Bartram*, and also declared that *Garrard & Bartram* were entitled to so much of the funds remaining in the hands of the receivers as should belong to *Lewer's* estate. *Wilkes* appealed.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

Argument.

Wilkes was not bound to communicate the existence of his own assignment to *Garrard & Bartram*. They made no inquiry of him. They did not tell him that they were going to advance

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money, and they were not induced by him in any way to alter their position. They referred to *Stephens* v. *Venables* (1).

Roxburgh, Q.C., and *J. Henderson*, for *Garrard & Bartram*:—

The Appellant's conduct amounted to fraud, or, at least, to negligence. He ought to have informed us of his prior assignment. The fair construction of the word "balance" in his acceptance of our notice is that it meant the whole sum that should be coming to *Lewer* in the suit. Though it is the duty of an assignee of a trust fund to inquire of the trustee whether he knows of any prior charge in favour of a third party, it is a fraud on the part of the trustee to conceal his own charge.

Beresford, for the trustee.

Judgment.

BACON, C.J.:—

This case is not without difficulty. There is, however, no attempt to dispute that *Wilkes* had a good security upon whatever was coming to *Lewer* in the suit. Having this security, there was presented to him the order of the 18th of September in favour of the Respondents, and he accepted it. The only question is whether it was incumbent on him when he did this to explain to them that he himself had a previous security upon the fund. I know of no authority for saying that it was his duty to do that. Suppose the case of bankers receiving notice of a charge upon all the moneys coming to their hands on behalf of a customer, would they be precluded from afterwards setting up the ordinary bankers' lien for the balance of the customer's overdrawn account if they did not, when the notice was given them, disclose the fact that the account was overdrawn? There is no suggestion of any inducement on the part of *Wilkes* to the Respondents to advance their money. The simple question is whether it is the duty of the trustee of a fund who has himself a charge upon it to communicate that charge to a person who gives him notice of a subsequent charge. That is all. I cannot see that there is any such duty, though it may be regretted that the Appellant did not inform the

(1) 30 Beav. 625.

Respondents of his charge. I do not think the order of the County Court can be sustained; but the case is much too near to the wind for me to make any order as to costs.

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Solicitors for Appellant: *Vizard, Crowder, & Co.*, agents for *W. Adams, Plymouth.*

Solicitor for *Garrard & Bartram: J. Pettengill.*

Solicitor for Trustee: *J. P. Pearse, Plymouth.*

In re LATHAM. *Ex parte* LATHAM.

C. J. B. 1876 Nov. 20.

Debtor's Summons—Disputed Debt—Staying Proceedings—Security—Discretion of Judge—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67), *s.* 2.

A debtor's summons was founded upon a bill of exchange. The summoning creditor had, before the hearing of the summons, commenced an action against the debtor upon the bill, which the debtor had obtained leave to defend without giving any security. He had then pleaded want of consideration. They now also alleged that the holder had notice of the want of consideration:—

Held, that, having regard to these facts, the proceedings upon the summons ought to be stayed pending the trial of the action, without security being required from the debtor.

Statement.

THIS was an appeal from a decision of the Registrar of the *Canterbury* County Court, sitting as Judge.

S. M. Latham and *William Forster* were partners as merchants at *Dover*. On the 16th of May, 1876, *Forster*, in the name of the firm, accepted a three months' bill of exchange for £1000, drawn upon the firm by one *F. L. Cotton* for his accommodation. *Forster* accepted this bill without the knowledge of *Latham*, and no consideration was given for it. On the 18th of May *Cotton* indorsed the bill to *N. Learoyd*, as a security for a sum of £1000, which he had on the 3rd of May lent to *Cotton*. The bill was not paid at maturity, and on the 24th of August *Learoyd* commenced, in the Exchequer Division of the High Court, an action against *Latham* and *Forster* upon the bill. Upon an application made under the *Bills of Exchange Act*, 1855, by the Defendants to Baron

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Statement.

Huddleston, for leave to appear and defend the action, leave was given without requiring any security from the Defendants. On the 23rd of August, 1876, *Learoyd* issued a debtor's summons against *Latham* and *Forster* upon the bill of exchange. They applied to the County Court to have the summons dismissed. The Registrar made an order staying all proceedings on the summons, upon the terms of *Latham* and *Forster* depositing £1100 as security for what might be recovered by *Learoyd* in the action, with costs.

From this order *Latham* and *Forster* appealed. They had pleaded in the action that *Learoyd* had given no consideration for the bill of exchange, and they also alleged that he had notice of the transactions between *Cotton* and *Forster*.

Argument.

Wheeler, for the Appellants:—

The Registrar has in effect reversed the order of Baron *Huddleston*. No security ought to have been required. In *Ex parte Turner* (1) the Court of Appeal said that, where the probability of success in an action appeared to be as much in favour of the Defendant as of the Plaintiff, security ought not to be required. That is the case here.

De Gex, Q.C., and *Beaumont*, for *Learoyd*:—

Under sect. 2 of the *Bills of Exchange Act* the Judge has no power to order the Defendant to give security if his affidavits are such as to throw the *onus probandi* upon the Plaintiff. Under sect. 7 of the *Bankruptcy Act*, the Court has a discretion as to requiring security. An order requiring security can do no harm to the debtor, for, as was said by Lord Justice *Mellish* in *Ex parte Lowenthal* (2), if the debtor commits an act of bankruptcy by not complying with the summons, no other creditor can found a petition for adjudication upon it, and the question of the debt must be tried upon the hearing of the petition. In *Ex parte Shorey* (3) your Lordship held that the Judge has a discretion as to requiring security.

Wheeler, in reply.

(1) Law Rep. 10 Ch. 175. (2) Law Rep. 9 Ch. 324, 330.
(3) 21 W. R. 105.

BACON, C.J.:—

The single question is whether the Registrar ought to have required that security to be given which the Act empowers him to require, on staying the proceedings upon the summons. Reference has been made to sect. 2 of the *Bills of Exchange Act*. In this case Baron *Huddleston* has, upon the materials which were furnished to him, given leave to defend the action, without requiring any security. The Defendants in the action have pleaded want of consideration. The Act says that the Judge may give leave to defend on such terms as he shall think fit. Under these circumstances, why should a different course be adopted in the Court of Bankruptcy? There is no suggestion of insolvency on the part of the debtors, or that the creditor will be in any way prejudiced. By the debtors' neglect to comply with the summons an act of bankruptcy is committed, and that act will remain. The question of the debt is put in a state to be tried, and it now stands for trial. Under the circumstances, having regard to the decision in *Ex parte Turner* (1), and not forgetting that in *Ex parte Lowenthal* (2), I think it is much more convenient that the trial should take place in the action than in the Court of Bankruptcy. The only question is whether security ought to be required. The learned Baron has, after a full discussion, come to the conclusion that no security ought to be required in the action. This is a fact to which I must have regard in the exercise of my discretion, and I think that the proceedings on the summons ought to be stayed without security. The costs of this appeal will be reserved.

Solicitors for Appellant: *Lawrance, Plews, & Co.*
Solicitors for Respondent: *Learoyd & Co.*

(1) Law Rep. 10 Ch. 175. (2) Law Rep. 9 Ch. 324.

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In re PHŒNIX BESSEMER STEEL COMPANY. *Ex parte* CARNFORTH HÆMATITE IRON COMPANY.

Rescission of Contract—Contract for Sale by Periodical Instalments—Insolvency of Purchaser—Right of Vendor to refuse to deliver without Cash Payment.

The *C. Iron Company* in October, 1874, contracted to supply the *P. Steel Company* with iron at a certain price, to be delivered in monthly instalments and to be paid for, as to some, by bills at four months, and as to the rest, by cash at a certain length of credit. The instalments were delivered till the month of February, 1875, inclusive, in which month the purchasing company called a meeting of their principal creditors, and stated that they were carrying on the business at a loss and were short of working capital, and asked for an extension of credit in their existing contracts, which however was refused them. The selling company then refused to deliver any more iron except upon immediate cash payments, and in consequence of that refusal the purchasing company gave notice to rescind the contract. The purchasing company continued to carry on the business after the meeting, and endeavoured to raise fresh capital by issuing preference shares, but in June, 1875, they passed a resolution for winding up. The selling company claimed to prove for damages for breach of the contract against the estate of the purchasing company:—

Held (affirming the decision of the Master of the Rolls), that there was no such declaration of insolvency at the meeting in February as to justify the selling company in refusing to deliver iron except for cash payments; and consequently that the purchasing company had a right to rescind the contract; and the claim for damages was dismissed.

In order to justify the vendors in such a case in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods.

Statement.

THIS was an appeal by the *Carnforth Hæmatite Iron Company* from the refusal of the Master of the Rolls to admit them to prove for £2138 damages in the liquidation of the *Phœnix Bessemer Steel Company, Limited.*

On the 31st of October, 1874, the *Carnforth Company* entered into a contract with the *Phœnix Company* for the sale to them of 2500 tons of pig-iron, as to 1250 tons at £5 per ton, and as to the other 1250 tons at £4 17*s.* 6*d.* per ton, "to be delivered at the Buyers' Siding at *Ickles* over the next ten months, say in about equal monthly quantities; payment by four months' bill net, or

cash less 2½ per cent. discount, on the 10th of the month next following each delivery."

On the 4th of November, 1874, a second contract was signed, whereby the *Carnforth Company* sold to the *Phœnix Company* 2500 tons of pig-iron, at the same price, to be delivered in the same manner as in the former contract over the next ten months, but the terms were to be "payment in cash on the 15th day of the month next following each delivery, less 2½ per cent. discount."

On the 11th of January, 1875, a further contract was entered into, whereby the *Carnforth Company* sold to the *Phœnix Company* 200 tons of pig-iron, at £4 10*s.* a ton, to be delivered at the same place "in about equal proportions over the next four months, commencing at once; payment cash on the 10th of the month next following each delivery, less 2½ per cent. discount."

Under the first contract the *Carnforth Company* delivered to the *Phœnix Company* 266 tons in November, 1874, 262 tons in December, 1874, 180 tons in January, 1875, and 102 tons in February, 1875.

Under the second contract they delivered only 42 tons early in November, 1874; but further deliveries under this contract were suspended at the request of the *Phœnix Company*, and such deliveries as were afterwards made were made under the first contract. No deliveries were made under the third contract.

On the 24th of February, 1875, the *Phœnix Company* called a meeting of their principal creditors, to which they invited the *Carnforth Company* to send a representative. In the letter of invitation they stated that it was "a private meeting of two or three of their friends."

At this meeting, which was attended by the secretary of the *Carnforth Company*, a statement of the affairs of the *Phœnix Company* was laid before the creditors present.

The secretary of the *Carnforth Company* stated in his affidavit that it appeared from this statement that the *Phœnix Company* were insolvent; but the account given by the secretary of the meeting of the *Phœnix Company* was as follows:—

"The meeting was called with a view to an arrangement being made with the principal creditors of the *Phœnix Company* for an

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extension of credit as to the accounts then due or immediately falling due, and for modifying the terms of the existing contracts for supplies of pig-iron by substituting four months' acceptances for cash payments. The statement of affairs laid before the said meeting did not shew that the *Phœnix Bessemer Company* was then insolvent, the fact being, that out of a nominal capital of £100,000, of which £80,000 had been paid up, the said company had sustained losses to the extent of £40,000, or thereabouts. Such statement did, however, shew that the said *Phœnix Company* was short of working capital, and that, having regard to its large turnover, the company would not be able to continue its business unless credit were given to it, or further capital was supplied."

The creditors of the company did not, however, fall in with the views of the directors of the *Phœnix Company*, and the directors accordingly called a general meeting of the shareholders for the 12th of March, 1875, for the purpose of calling up an increase of capital.

In the meantime the *Carnforth Company* called upon the *Phœnix Company* to pay £210, which was due on the 10th of December, for the delivery under the second contract, and, as it was over due, called upon them to deduct 1 per cent. discount instead of $2\frac{1}{2}$ per cent. This amount was paid after some delay. The *Phœnix Company* also met the bill drawn on them by the *Carnforth Company*, which became due in March, and accepted bills for their other deliveries, which were, however, dishonoured at maturity.

On the 10th of March the *Carnforth Company* wrote to the *Phœnix Company* as follows:—

"In the view of the shareholders meeting, we beg of you to impress upon them that cash payments for pig-iron will in future be the rule, and that to compete favourably sufficient capital should be forthcoming to enable business to be carried on upon those terms if it is to be carried on successfully."

On the 12th of March the meeting of the shareholders was held, and a committee of investigation was appointed, who recommended that fresh capital to the amount of £20,000 should be

created by the issue of preference shares, and this was resolved upon by the shareholders at a meeting held on the 9th of April.

In reply to the letter of the 10th of March the *Phœnix Company* wrote on the 13th of March as follows:—

"We note in your letter that you say 'cash payments for pig-iron will in future be the rule.' We shall expect you, however, to complete your contracts under the terms arranged, by which time we believe we shall be in a position to obtain such terms as will be advantageous to ourselves, and perhaps mutually advantageous to your firm, should we prefer to continue our business with you."

The *Carnforth Company*, however, declined to deliver any more iron without cash payments, the last delivery having been made on the 9th of February; and on the 23rd of April the *Phœnix Company* wrote to them as follows:—

"As you decline to deliver the iron against your contracts, according to the terms thereof we beg to inform you that we cancel them."

There was, however, no evidence that the *Carnforth Company* actually received this letter.

The *Phœnix Company* continued to carry on their business till May, 1875, but the issue of preference shares having failed to produce more than £13,000, and a firm of *Gilead Smith & Co.*, whose acceptances they had taken to the amount of £14,155, having stopped payment, a meeting of shareholders was held on the 9th of June, when resolutions were passed for winding up the company voluntarily. At this meeting a statement was presented to the meeting, by which it appeared that their assets, including the unpaid capital and the value of the plant and buildings, exceeded their liabilities.

The *Carnforth Company* claimed to prove as creditors for £2138 for damages for the breach of the three contracts, which the liquidators refused to allow.

The case was brought before the Master of the Rolls on the 1st of August, 1876.

Locock Webb, Q.C., and *Alfred Bailey*, appeared for the *Carnforth Company*.

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Judgment, M.R.

Bagshawe, Q.C., and *G. C. Price*, for the liquidators of the *Phœnix Company*.

JESSEL, M.R.:—

There are three contracts. The first, which is the most material one, was a credit at four months' bill, net, or cash less 2½ per cent. discount, on the 10th of the month next following each delivery; that is, a credit of four months if credit should be taken. The other two contracts were for credit on the 15th and 10th of the next month respectively. They are contracts of minor importance, though the amount of damages on the second is, I think, rather more than that on the first. The question is, whether there was such notice of insolvency as entitled the vendor to refuse to deliver any more without cash, that is, to alter the terms of the contract.

As I understand the decisions, where there has been actual insolvency, or a declaration that the purchaser does not choose to pay, the vendor is not bound to deliver without the cash. It is unreasonable to say that he commits a breach of contract by not delivering that which he has notice will not be paid for. All the cases on the point are, I think, summed up in *Ex parte Chalmers* (1) by Lord Justice *Mellish*, who, after reviewing the cases, said: "Had the vendor in this case a right to refuse? In my view, that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not." Then he goes on to say why not, namely, because he had given notice of insolvency, which means that he did not intend to pay. Therefore the real question here is whether the company had given notice of insolvency, that is, of not intending to pay.

The circumstances are these:—[His Lordship then stated the circumstances down to the 25th of May, 1875, when certain acceptances of the firm of *Gilead Smith & Co.* to the *Phœnix Company* were dishonoured, and that firm, being indebted to the company or their indorsees on acceptances under discount to the amount of £14,155, immediately afterwards suspended payment, which led to the company being placed in liquidation.]

(1) Law Rep. 8 Ch. 289, 293.

Under these circumstances, was there a declaration of insolvency in the sense of a notice to the vendors that they would not be paid? Take, first, the four months' acceptances. There was no such notice. On the contrary, on the 13th of March, 1875, the vendors were told the company would be in a position to pay them if they carried out their contract according to the terms of the credit for four months and one month. Nor were they so told at the original meeting, though there was an endeavour to get time, which was refused; all parties understood that there was an endeavour to raise £20,000 by preference capital. There was a large amount of assets in possession of the company over its liabilities, which one of the parties before me treats as an actual surplus, while the other party denies that it should be so treated, from the circumstance that they wanted time to pay.

Under these circumstances, can I hold that there was such a declaration of insolvency as amounted to notice to the vendors that their bills, if given, would not be paid, so that it made it unreasonable to call upon them to perform their contract? In the absence of any decision, I do not think I ought to carry the doctrine further.

The principle, no doubt, is not to interfere with men's contracts, and not to imply a term unnecessarily, but the Courts have gone to this extent—they have said, when there is an insolvency declared, which amounts to a notice to the vendor that he will not be paid, it is unreasonable to suppose that persons contracted in view of that contingency, and intended that the vendor should be liable in damages for not delivering goods when it was certain that he would not be paid for them. It is similar to the doctrine of stoppage *in transitu*, by which, on the insolvency of the purchaser becoming known, the vendor may stop his goods and prevent them from being delivered, although perhaps by law the legal right of possession has passed from the vendor to the purchaser. Those are, so to say, terms implied by the law of contracts, or rather they are legal additions made to the contract in view of their reasonableness, but you are not to alter men's written contracts without that ground.

It appears to me that, in order to bring the case within the rule, there must be that sort of insolvency declared which ought to

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satisfy every reasonable man that there is no intention on the part of the purchaser to pay for the goods, and no probability that he will pay for them. I think that is the way in which Lord Justice *Mellish* intends to put it in *Ex parte Chalmers* (1), in which case he says: "I am therefore of opinion that in the present case, when the insolvency of the purchaser had been declared, the vendor was not bound to deliver any more goods until the price of the goods delivered in November, as well as those which were to be delivered in December, had been tendered to him. The only question then is, what was the effect of the vendor's letter of the 23rd of December? Mr. *Russell* argued that the refusal to perform a contract before the time arrives for its performance is in itself a breach of the contract. But that can only be the case where the person who refuses to perform the contract is not entitled to refuse. Had the vendor in this case a right to refuse? In my view, that depends upon the question whether the insolvent purchaser was ready and willing to pay the price both of the November and December instalments. It is clear that he was not." Then he goes on to say that the contract was not put an end to because the creditors might adopt it, because, though not put an end to, the vendor had a right to say, "I will not deliver unless the cash is paid, that is, I will not follow out the terms of the actual contract unless a new term is introduced. You are in such a state of insolvency that you cannot pay, and do not intend to pay me, and therefore I will not and cannot deliver the goods."

In the case of *Morgan* v. *Bain* (2) it is put on rather a different ground, although it still follows out what took place in *Ex parte Chalmers*. In that case it is said that the insolvent must intend to abandon and to put an end to the contract, and that in that case the vendor certainly will not insist on delivery, because if he insists on delivery he insists on delivering the goods without getting paid for them. In other words, it comes to this, that the insolvent not having done anything by which he would be held to have abandoned the contract by reason of his insolvency, and not having given notice to anybody to complete it—then the vendor not doing anything, and not attempting to deliver, will have to be treated as abandoning it too. The result in that case was that

(1) Law Rep. 8 Ch. 289, 293. (2) Law Rep. 10 C. P. 15.

there was a mutual intention to abandon and rescind. I cannot possibly hold in this case that there was anything like that on the part of the purchasers. They were willing to pay the money, and they were insisting that they would be able to pay it by the time the delivery was made. There was no abandonment on the part of the vendors, because they said, "We will deliver if you will pay us cash." Therefore it was not a case of abandonment, but a case of refusal. The only question is whether they were justified in making the refusal, and, as I said before, I think they were not. The company were actually solvent, and taking steps to raise the money, which steps were assumed by all parties to be reasonable, and likely to succeed. They were giving notice that they would be able to pay in due time if the other side would deliver, and they *bonâ fide* intended to raise the money and pay for the goods to any persons. They were not then insolvent, and they did not declare themselves insolvent in the sense of meaning or saying that there was neither possibility nor intention of paying. The mere fact that a man says, "I am embarrassed, and I may have a difficulty to pay, but go on with your contract, and I will find money enough to pay you your claim," cannot be sufficient to bring it within the rule so as to superadd a term to the contract, and entitle a man to say that he will vary the terms, and not strictly adhere to the original terms of the contract. It appears to me that, if I were to hold that, I should be extending the rule to a case in which the principle does not really apply, by saying that this was a case which entitled the vendors to say, We will not deliver without cash payments. Therefore, in my opinion, the application fails.

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Judgment, M.R.

From this decision the *Carnforth Company* appealed.

C. A.

The appeal came on to be heard on the 15th of November, 1876.

Locock Webb, Q.C., and *Alfred Bailey*, for the Appellants.

Argument.

Before opening the appeal they asked leave to adduce fresh evidence, under Order LXVIII., rule 5, as to what passed at the meeting of the 24th of February, 1875, and on the question whether the letter of the 23rd of April, 1875, had been received

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Argument.

by the company. They admitted that there had been no surprise, and that the evidence had not been discovered since the hearing.

JAMES, L.J.:—We cannot admit this fresh evidence. It would be too dangerous. We desire it to be understood that parties must not take the chance of the result of the hearing in the Court of first instance, and then tender fresh evidence before the Court of Appeal. The proper course in this case would have been to apply to the Master of the Rolls to let the witnesses be examined before him on these points.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

Locock Webb, Q.C., and *Alfred Bailey*, then proceeded with their argument:—

Our contention is, that we never abandoned the contracts with the *Phœnix Company*, but they were broken by them by what passed at the meeting of the 24th of February; and if not then, at all events by the subsequent dishonour of their acceptances.

What passed at the meeting of the 24th of February was equivalent to a declaration of insolvency, and then we had a right to refuse to deliver the subsequent instalments of iron except on the terms of cash payments. That refusal was not a breach of the contracts by us; it was the exercise of a right which is presupposed in all contracts for sale of goods, and is similar to the right of stoppage *in transitu*: *Ex parte Chalmers* (1); *Bloomer* v. *Bernstein* (2); *Morgan* v. *Bain* (3); *In re Contract Corporation* (4); *In re Trent and Humber Shipbuilding Company* (5). This is admitted by the Master of the Rolls in his judgment; but his Lordship held that the meeting of the 24th of February did not amount to a declaration of insolvency. It is not necessary, as the Master of the Rolls appears to assume, that a purchaser should say he is insolvent—if that were so, it would narrow the operation of the rule most unreasonably; nor is it necessary that it should be shewn that if all the assets were realized there would be a deficiency. It is enough that at the time the purchaser was unable to meet his engage-

(1) Law Rep. 8 Ch. 289.
(2) Ibid. 9 C. P. 588.
(3) Law Rep. 10 C. P. 15.
(4) Ibid. 8 Eq. 14.
(5) Law Rep. 6 Eq. 396; Ibid. 4 Ch. 112.

ments. This was the case with the *Phœnix Company.* They said that if they could raise money they would be able to go on with their business, and they expected to do this by issuing fresh shares. But the possibility of raising money does not constitute solvency, and in the event it turned out that they could not raise the necessary capital. The essence of a contract for periodical deliveries is that the purchaser shall throughout be able and willing to pay. That the company could not, in fact, pay at this time, is shewn by the postponement of the payment which was due on the 10th of December, and by the dishonour of our acceptances soon afterwards: *In re Globe New Patent Iron and Steel Company* (1). With respect to the letter of the 23rd of April, 1875, in which the *Phœnix Company* purported to cancel the contracts, if it was really sent, we say that they had no power then to cancel the contracts, as they had already broken them by their insolvency.

Bagshawe, Q.C., and *C. Gould* (*G. C. Price* with them), for the liquidators of the *Phœnix Company*:—

The first question for consideration is, what is the implied qualification in such a contract as this, which gives the vendor the right to refuse to deliver his goods? All the cases shew there must be, first, either actual bankruptcy or insolvency, or a declaration by the purchaser that he is insolvent; or, secondly, actual default in payment; or, thirdly, a statutory meeting of creditors, which is in fact a declaration of insolvency. There was here, certainly, no actual default in payment, nor any statutory meeting of creditors; but the Appellants rely upon what took place at the meeting of the 24th of February, as shewing that the company were then insolvent, and as amounting to a declaration of insolvency. But was there any insolvency at that time? Were the company in such a position that payment of the Appellants or any other creditor would have been a fraudulent preference? For that is a fair test of insolvency. Anything short of this has never been held to justify refusal to deliver goods or stoppage *in transitu.* Nor was there any declaration of insolvency. The meeting of the 24th of February was not a general meeting of creditors, but only a meeting of a few of the principal creditors

(1) Law Rep. 20 Eq. 337.

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to whom the company desired to appeal for a relaxation of the terms of their contracts. They did not declare themselves insolvent, but only that they were carrying on the business at a loss, and that they could not continue to do so. A trader who is in this position may fairly appeal to his creditors for indulgence without declaring himself insolvent, and without being so. A vendor cannot excuse himself from delivering goods because he suspects the purchaser to be insolvent. Such a doctrine would produce the greatest inconvenience. A sufficient proof that this *Phœnix Company* were not then insolvent is found in the fact that they went on trading, and were treated by the Appellants themselves as a going concern for some months after the meeting. They received payment from them, and drew bills on them, and there is no evidence of any acceptances of the company being dishonoured till the month of May. The company might have got through its difficulties if it had not been for the failure of *Gilead Smith & Co.*

In *Bloomer* v. *Bernstein* (1) there was actual default in payment. In *Ex parte Chalmers* (2) there was a declaration of insolvency, which was an act of bankruptcy. In *Morgan* v. *Bain* (3) the purchasers were not only insolvent, but gave notice of it to the vendors. We say, then, that there was nothing to justify the vendors in refusing to deliver the goods except for cash. By so doing they committed a breach of the contract by refusing to perform it, and gave us the option of rescinding it or suing them for damages. We took the first course.

[BRAMWELL, J.A.:—You were certainly insolvent in June. Are you not liable for damages for breaches in June and the following months? Could you rescind the whole contract on account of the refusal of one delivery? *Simpson* v. *Crippin* (4).]

Each contract, although for periodical deliveries, was one entire contract, and by refusing one delivery the vendors broke the whole contract. Their refusal extended to all the deliveries on all the contracts: *Reg.* v. *Sadlers' Company* (5); *Withers* v. *Reynolds* (6); *Freeth* v. *Burr* (7).

(1) Law Rep. 9 C. P. 588.
(2) Ibid. 8 Ch. 289.
(3) Ibid. 10 C. P. 15.
(4) Law Rep. 8 Q. B. 14.
(5) 10 H. L. C. 404, 416.
(6) 2 B. & Ad. 882.
(7) Law Rep. 9 C. P. 208.

Locock Webb, in reply.

JAMES, L.J. :—

The full discussion which this case has received, and, I may add, the very able argument which we have heard from Mr. *Bagshawe*, have removed entirely the doubts and difficulties which I must confess that throughout a great part of the case I entertained as to whether the decision of the Master of the Rolls was correct. I am satisfied now that the decision of the Master of the Rolls was correct. The question is, whether there was, on and after the 24th day of February, such an insolvency and such a declaration of insolvency as to bring the case within the rule as laid down in the case of *Ex parte Chalmers* (1), and the cases which have followed that case.

Now, I do not think that I shall be competent to lay down (and I do not know that it would be convenient or useful to lay down) anything pretending to be an exhaustive catalogue of the circumstances which would be so held; but I am satisfied, upon the facts as now disclosed and made clear to us, that there was in no sense of the word an insolvency or declaration of insolvency at the time of that meeting of the 24th of February. The company, no doubt, was a limited company, but a company having a very large amount of property and fixed plant, having also a very considerable amount of uncalled capital; and during the month of February, during the month of March, during the month of April, and I believe during the month of May, they continued to carry on their business, continued meeting their liabilities and receiving the debts due to them as a going and a solvent concern. It is not immaterial to observe that during that interval they paid one bill of exchange due to the Appellants under their own contract; they accepted other bills of exchange which were tendered to them by the Appellants for their acceptance. Therefore they were going on meeting their liabilities and receiving the sum from which those liabilities were to be met. But it is said that in the month of February they called their creditors together. Of course that is an ambiguous phrase. Calling creditors together has a kind of technical meaning under the Acts of Parliament and also

(1) Law Rep. 8 Ch. 289.

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in commercial phraseology. According to that view, it amounts to a judicial winding-up, or something of that kind. But here what really did take place, when we understand it, is, that, being under-capitalled, having a larger business than they could really and conveniently carry on with the actual amount of ready assets that they had available, they called together a few of their principal creditors to whom they were customers, and probably profitable customers in the ordinary course of business as it went on, and said, "Now we require more capital and more credit, and if we do not get one or both of these, we shall have to stop—that is to say, not stop in the sense in which we shall have to become insolvent and to dishonour our bills and not to pay our creditors, but we shall have to do as a banker does when he gives up his bank, and we shall have to discontinue that business which we are carrying on, which, if it is carried on, may be profitable to us, and which may be profitable to you, but which is not profitable at present." They said: "We shall want more capital and more time; will you come in to us and make an arrangement with us?" A discussion with a few friends seems to me to be very little more than a discussion with a banker under similar circumstances, but in this case it ended with an intention to raise £20,000 more capital by preference shares, and to call up the shares of those shareholders whose solvency has not been questioned by anything which has been laid before us, and then it was sought to get further time for their contracts, which would enable them to carry on a much larger business than they otherwise could carry on. That being the state of things, it seems to me that it would be extending the rule beyond any reasonable limit, and lead to all the enormous inconveniences which Mr. *Bagshawe* pointed out to us, and that it would open it to a person in the position of the Appellants to say, "We then suspected that you were not solvent; we then suspected that if things came to a winding-up, you would not be able to pay your bills, and the event has shewn that we were right." That is not, in my opinion, sufficient to bring it within the rule; but there must be something, at all events, like proved or admitted insolvency, or circumstances shewing beyond all doubt that they were insolvent at that time, and insolvent in this sense—that there was a tacit or practical declaration that

they would not be ready and willing to meet their engagements when their engagements became due. That has not been proved in this case, and not having been proved, I am of opinion that the Master of the Rolls' judgment is right, and that this appeal must be dismissed with costs.

BAGGALLAY, J.A.:—

It is unnecessary for me to say what my opinion of this case would have been if the meeting of creditors held on the 24th of February had been a meeting summoned under the *Bankruptcy Act*, and if at that meeting either a statement of affairs had been laid before the creditors present, or a statement either in writing or verbally had been made to the creditors, indicating an inability on the part of the *Phœnix Company* to meet their engagements; but I am by no means certain that, even if such had been the case, having regard to the circumstances which subsequently transpired (and particularly to the payment of the cheque for £210, and to the meeting of the bill which became due in the month of March), that this case would have been brought under the authority of the case of *Ex parte Chalmers* (1), and the other cases that have been referred to. It is unnecessary, however, to go into that question, for I am satisfied that at the meeting of creditors on the 24th of February no such statement was made. The meeting was convened by notice addressed by the *Phœnix Company;* they said that they had requested two or three of their friends to meet them for the purpose of seeing what arrangements might be made; and one test which I have applied in my own mind to the consideration of this question is this—Would it have been possible for the *Phœnix Bessemer Company* to have had a compulsory order made upon them for winding up in respect of what took place at that meeting? I venture to think it would not. None of the circumstances pointed out by the Act of Parliament as amounting to inability to meet the payment of their debts would have been covered by what took place. It appears to me to have been an honest endeavour on the part of the *Phœnix Company* to obtain from their principal creditors certain modifications of the general conditions of contracts by which they were at that time bound.

(1) Law Rep. 8 Ch. 289.

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If they could have obtained that modification, they might possibly have carried on a successful business. It appears that the creditors were not willing to render the assistance that was asked of them, and therefore they wanted a certain amount of additional capital. Then misfortunes, and losses, and liabilities came upon them from the failure of the firm of *Gilead Smith & Co.*, which fell like a heavy blow upon them, and in consequence of which, a short time afterwards, they were obliged to submit to be wound up. It appears to me that the decision of the Master of the Rolls was right, and it would be very much stretching the principles which have been laid down by the Court in the cases which Mr. *Locock Webb* has referred to, to apply them to a case like this.

Bramwell, J.A. BRAMWELL, J.A.:—

I am of the same opinion. I agree with Lord Justice *James* that nothing is more difficult than to give an exhaustive definition applicable to such a case as this is, or even in almost any other matter; at least, it is so according to my experience. But it seems to me that an insolvency such as would excuse the now claimants from what was a breach on their part of the contract, unless they had an excuse for it, ought to be an inability to pay, avowed either in act or in word, and a consequent intention on the part of the indebted company not to pay, their debts. Now I see no evidence of such an avowed inability on their part; at least I will not say there is no evidence, but at all events there is no sufficient evidence to induce me to come to the conclusion that there was such inability, and, consequently, I think that the order of the Master of the Rolls was right.

Solicitor for Appellants: *C. W. Dommett,* agent for *Slater & Poole, Manchester.*

Solicitors for Respondents: *Pilgrim & Phillips,* agents for *Watson & Esam, Sheffield.*

Ex parte COOKE. *In re* STRACHAN.

C. A.
1876
Nov. 16.

Stockbroker—Agency—Following Money.

C., a trustee, employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling day, and received the price of the consols in a cheque, which he paid into his account at his bankers. He stopped payment before the settling day, and went into liquidation. *C.* claimed so much of the broker's balance at his bankers as was attributable to the price of the consols. The Registrar disallowed the claim, holding that the relation between broker and customer was similar to that between banker and customer, and that *C.* was only a general creditor :—

Held, on appeal, that as the price of the consols was known by the broker to be trust money, it could be followed, and that the claim must therefore be allowed :

Held, by *James*, L.J., and *Bramwell*, J.A., that, apart from the question of trust, the position of a broker is not that of a banker, but of an agent into whose hands money is put to be applied in a particular way, and that money paid to him can therefore be followed by the customer.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting for the Chief Judge.

The Appellant, Mr. *Cooke*, was the surviving executor and trustee of the will of *Charles T. Cooke*. The residuary estate consisted of £4212 1*s.* 3*d.* consols. On the 9th of October, 1875, Mr. *Cooke*, being desirous of investing this fund on some other security which would bring in a higher rate of interest, wrote to *Strachan*, who was a stockbroker, appointing a meeting on the 11th to make arrangements for a change of investment. On the 11th of October, accordingly, he called at *Strachan's* office, and explained to him that he (Mr. *Cooke*) had only a life interest in the fund, which, subject to the life interests of himself and his wife, belonged to his children. *Strachan* recommended an investment in *London and North Western Railway* stock, to which Mr. *Cooke* assented, and the sale of the consols and the purchase of the railway stock were at once effected by the agency of *George Strachan*, a son and clerk of *H. S. Strachan*. Before Mr. *Cooke* left, bought and sold notes were made out and handed to him, together with the sum of

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12*s.* 6*d.*, the balance of the two transactions. The notes were as follows:—

"11 Oct. 1875.

Sold for Rev. *C. R. Cooke*, executor of *C. T. Cooke*, deceased, £4212 1*s.* 3*d.* consols at 93¾	£3948	16	3
Fee . .	0	2	6
For cash.	£3948	13	9

H. S. Strachan, Broker."

"11 Oct. 1875

Bought for Rev. *C. R. Cooke*, £2726 *London and North Western Railway* stock . .	£3908	8	0
Stamp	19	15	0
Fees	0	7	6
Commission, ½	19	10	9
	£3948	1	3

H. S. Strachan, Broker.

For settlement."

The consols were sold for cash, and Mr. *Cooke* went with *S. Strachan* to the *Bank of England* at once, and completed the transfer. The railway stock was bought for the settling day as usual. The next settling day was the 13th of October.

The consols were paid for by a cheque for £3948 16*s.* 3*d.*, which was received by *George Strachan*, who, as he deposed, informed Mr. *Cooke* that the railway stock could only be purchased for the settlement, and offered to pay the proceeds of the consols to Mr. *Cooke's* account at the *Cheltenham Bank*, for which Mr. *Strachan* was broker. Mr. *Cooke* stated that he would prefer leaving the amount in *Strachan's* hands. The cheque was accordingly retained, and on the same day it was paid into *Strachan's* account at his bankers.

On the settling day, the 13th of October, *Strachan*, being unable to meet his engagements on the *Stock Exchange*, suspended payment. On this day the balance standing to his credit at his bankers was £3812 13*s.* 8*d.*

Strachan subsequently took proceedings for liquidation of his

affairs by arrangement or composition, and the balance came into the hands of the trustees.

Mr. *Cooke* moved in the Court of Bankruptcy for a declaration that the sum of £2068 1*s.* 9*d.*, or thereabouts, part of the above balance, or some further or other part of that balance, arose from and represented a part of the £3948 16*s.* 3*d.*, and that the same might be ordered to be paid to him.

Mr. Registrar *Pepys* refused the motion, saying: "Is there any ground for saying that, as between a stockbroker and his client, there is the relation of trustee and *cestui que trust?* I should have thought, considering the number of stockbrokers that there are in the City, and the unfortunate number of instances in which they are obliged to suspend payment, if that were the settled law it would have been determined by numbers of recent cases, beyond the reach of all argument. But, so far from that being the case, I am referred to an old case in the time of Lord *Ellenborough* in which it was held that a stockbroker was a trustee for the person who employed him. That case, however, differed essentially from the one before me. In that case the stockbroker went away with actual property in his possession which was the property of his client. Certain American bonds had been purchased with the money of his client, those bonds were found in his possession, and it was held that the client was entitled to take possession of those bonds. If, in this instance, Mr. *Strachan* had purchased the *London and North Western Railway* stock, and that stock had been found in his possession at the time of his bankruptcy, Mr. *Cooke* would have been entitled to have said, 'Give it back to me,' and it would have been impossible to resist his contention. But the present case is entirely different from that. In this case the one stock was sold, the other was not purchased, and the money was still in the hands of the broker. I cannot hold, therefore, that the broker was more a trustee for his client than a banker would be. It appears to me that bankers and brokers are all placed in the same position. If I were to hold that a broker was a trustee for his client, I must equally hold that a banker would be so also. I am not able, therefore, to come to any other conclusion than that no other relation existed between Mr. *Cooke* and the bankrupt than that of debtor and creditor. As a creditor, Mr.

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Cooke will be entitled to prove for the money he has lost, and receive a dividend, but no preferential payment can be established in his favour. Having taken that view of the matter, it is not necessary to go into the question how far the money can be traced."

Argument.

De Gex, Q.C., and *Robertson Griffiths,* for the Appellant:—

The question is, whether a stockbroker is like a banker, or whether he receives money in a fiduciary character like an agent or factor. We say that he receives it in the latter character, since it is put in his hands to be applied for a particular purpose. *Taylor* v. *Plumer* (1) is precisely in point, and shews that the money in the hands of a broker may be followed. The position of a banker is quite different, the customer's money is simply lent to him, and he is at liberty to employ it as he pleases: *Foley* v. *Hill* (2); but in the same case the *quasi* fiduciary position of a factor is distinguished (3). *Frith* v. *Cartland* (4) is a strong case in favour of tracing the money.

[JAMES, L.J., referred to *Inman* v. *Clare* (5).]

Then, moreover, the broker here knew that the money was trust money, and could not be lent to him without breach of trust, and lending is, therefore, not to be inferred; but whether that be so or not, it came to his hands with notice of a trust, and, therefore, can be followed.

W. G. Harrison and *Horton Smith, contrà,* for the trustee:—

The principle cannot be that a broker is bound to apply the particular sum of money in purchase of the stock which has been bought through him. He has a right to pay the money into his bankers: *Reg.* v. *Christian* (6). The money was left in his hands to be used by him; he took it as his own, subject to his obligation to purchase the stock. If he were treated as a trustee, then he would not be liable to purchase the stock if the banker failed; which is against reason and against the understanding of all persons concerned in purchases of stock.

(1) 3 M. & S. 562.
(2) 2 H. L. C. 28.
(3) Ibid. 35.
(4) 2 H. & M. 417.
(5) Joh. 769.
(6) Law Rep. 2 C. C. 94.

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JAMES, L.J.:—

Judgment, James, L.J.

The material facts of this case lie in the very smallest compass. *A.* employs an agent to sell trust stock, giving him full notice that it is trust stock, and to invest the proceeds on behalf of the trust estate. The money arising from the sale is trust money, and by no bargain between *A.* and the broker, nor by any rule of the *Stock Exchange*, can it be made anything but trust money liable to be followed as such. Even had there been no trust, it appears to me that the case must have been decided in favour of the Appellant, for I cannot find any distinction between this case and *Taylor* v. *Plumer* (1).

BAGGALLAY, J.A.:—

Baggallay, J.A.

I do not give any opinion how this case would have stood if the money had not been trust money, or if the broker had received it without any notice of its being such. Before doing so I should desire an opportunity for further consideration, though I certainly am at present much impressed by the decision in *Taylor* v. *Plumer*. It is clear, however, to my mind, on the evidence, that *Strachan* was informed of the fact that the consols were a trust fund. I assume that the trusts of the will authorized a sale of the consols, and an investment of the proceeds in railway stock, and that the employment of *Strachan* as broker was, therefore, authorized; but if the fact was communicated to him that the consols were trust funds, he was bound to deal with the produce as such. I am not prepared to say that his paying the money into his account at the bank was necessarily a breach of trust, but the money so paid in remained trust money, and if it can be traced, it can be followed. There may be difficulty in tracing it, but that does not affect the principle. The case must go back to the Registrar to ascertain whether any part of the balance at the bank arose from the trust funds.

BRAMWELL, J.A.:—

Bramwell, J.A.

I am of the same opinion. If the whole of the money had remained in the hands of the bankers without being drawn out, I

(1) 3 M. & S. 562.

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think it clear that the *cestui que trust* could have claimed it as trust money traced into their hands, and if on properly attributing the payments any part of it is found to remain there, the same rule must apply to what so remains. As to the other point, whether the money could have been followed if it had not been trust money, the case appears to me undistinguishable from *Taylor* v. *Plumer* (1). The Registrar laments that he was referred to no other case than an old case in the time of Lord *Ellenborough* in support of the proposition that a stockbroker is a trustee for the person who employs him, and he goes on to say: "That case, however, differed essentially from the one before me. In that case the stockbroker went away with actual property in his possession, which was the property of his client. Certain American bonds had been purchased with the money of his client—those bonds were found in his possession, and it was held that the client was entitled to take possession of those bonds." Now, these bonds were not the property of the client, by reason of his having ordered them to be purchased, for he had never done so, and they could only be held to be his property because they were purchased with his money, and this necessarily involves the conclusion that if the broker had been caught with the money upon him the client could have claimed it. And on what ground could he have claimed it? Because the money was paid to the broker, not as a trustee in the strict sense of the word, so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him, but was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal. A difficulty in tracing money often arises from the circumstance that payments now are not usually made in gold, but by cheques which go into a banking account, so that the sum is mixed up with the other moneys of the customer. But if this payment were made by a bag of gold which the broker put into his strong box, and then misapplied part of the money, leaving the rest in the bag, there would be no doubt that what was so left could be claimed as the money of the client. The use of cheques may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the

(1) 3 M. & S. 562.

client, appears to me to be covered both by the reason of the thing and by the authority of *Taylor* v. *Plumer* (1).

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The case was accordingly remitted to the Registrar to ascertain what part, if any, of the balance arose from the proceeds of the consols.

Solicitors: *Dawes & Sons; Sole, Turners, & Knight.*

Ex parte YALDEN. *In re* AUSTIN.

C. A. 1876 *Nov.* 16.

Solicitor's Lien—Trustee in Bankruptcy—Lien of Solicitor of Trustee—Bankruptcy Rules, 1870, *r.* 249.

The trustee of a bankrupt's estate appointed a solicitor, whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by the creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs:—

Held (affirming the decision of the Registrar), that the solicitor had a lien upon all documents, the fruits of his own labour or expense.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge, refusing to direct the delivery up by the late trustee in *Austin's* bankruptcy, and his solicitors, of all books of every description, letters, deeds, accounts, documents, memoranda, and other papers and writings in their possession belonging to the estate, or containing any entry, memorandum, or minute in any way relating to the estate, or to their dealings with the same, or to the office of trustee of the estate.

The bankruptcy took place on the 19th of July, 1872, and on the 12th of September *Hayward* was appointed trustee, and a committee of inspection chosen. On the same day *Hayward* appointed Messrs. *Sheffield & Sons* his solicitors, which appointment was confirmed by the committee of inspection. Messrs. *Sheffield & Sons* continued to act as such solicitors till May, 1876, when *Hayward* was removed by the creditors, and *Yalden* appointed in his room.

(1) 3 M. & S. 562.

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Ex parte YALDEN. *In re* AUSTIN.

Statement.

Yalden then applied for an order to the above effect against *Hayward*, but on its being represented that *Sheffield & Sons* held all documents that there were, the Registrar directed them to be served, which was done.

The estate of the bankrupt, who was a well-known builder in the west of *London*, chiefly consisted of an extensive leasehold property, heavily incumbered, and a considerable amount of professional business was done by *Sheffield & Sons*, as solicitors to the trustee, including Chancery suits, common law actions, and conveyancing. Some of their bills of costs had been taxed and paid, some taxed and not paid, and some had not been delivered.

The documents in the possession of Messrs. *Sheffield* were voluminous, and comprised abstracts, briefs, drafts, deeds, copies of deeds, letters, Chancery proceedings, papers in common law actions, affidavits, cases for opinion of counsel, &c., and they resisted the application for delivery on the ground that they had a lien on them for costs. The books of account of the estate, and other similar documents, were not in their possession, having been in the custody of the old trustee, and handed over by him to his successor.

On the application being heard, Messrs. *Sheffield* undertaking, without prejudice to their lien, to produce at all reasonable times, and subject to the payment of their proper costs and charges, all papers in their possession to the new trustee or his solicitor for their inspection, and also undertaking, within fourteen days from the date of the order, to take into the Taxing Master's office any bill of costs they might have against *Hayward*, as late trustee, or the estate, no further order was made than that Messrs. *Sheffield* should have their costs of the application out of the estate.

The trustee appealed.

Argument.

Hemming, Q.C., and *Yate Lee*, for the Appellant:—

The lien of the solicitor cannot be higher than that of his client. When a trustee in a bankruptcy is changed, the old trustee, unlike a private trustee, has no lien as against the estate, as is clear from Bankruptcy Rules, 1870, r. 249; and having none himself can give none to his solicitor.

Turner v. *Letts* (1) fully recognises the rule that a trustee

(1) 7 D. M. & G. 243.

C. A. 1876

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cannot give his solicitor any larger lien than he possesses himself. There is no hardship in not giving a solicitor in a bankruptcy the ordinary negative or obstructive lien, because he has a much better protection in the fact that the Court never allows assets to be divided until the solicitor's costs are paid.

Roxburgh, Q.C., and *C. H. Anderson*, for *Sheffield & Sons*, and *W. P. Beale*, for *Hayward*, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the Registrar's order in this case was quite right. The application is really an attempt to change a solicitor in a cause otherwise than upon the usual terms. A man has a right to change his solicitor if he likes, but then the law imposes certain terms in favour of the solicitor: that is to say, that the papers in the suit cannot be taken out of his hands without his having his costs paid. Messrs. *Sheffield* have never claimed any lien upon the papers belonging to the estate: the things upon which they claim a lien are things upon which they have expended their own labour or their own money. Why are they not to have that lien in the same way as any other workman who is entitled to retain the thing upon which he has worked until he is paid for it. Then, with regard to Mr. *Hayward*, it would be monstrously unjust to say that a trustee is bound to find money to pay for this work done for the benefit of the estate, and then to hand over that work without being paid for it. If the *cestui que trust* wants the work handed over to him, he must find the money. He can go himself and say, "I am the real person, I will pay your costs;" but we cannot make a mere trustee find money out of his own pocket.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. Having regard to the admitted facts of the case, and to the statements made by Mr. *Sheffield* in the course of his examination before the Registrar, and which examination was entered in the order, the order of the Registrar appears to me to be the only order he could with propriety have made.

C. A.
1876
Ex parte YALDEN.
In re AUSTIN.
Judgment, Bramwell, J.A.

BRAMWELL, J.A.:—

I am of the same opinion. As the substance of the matter is that the estate employed Mr. *Sheffield*, this is really an attempt, as the Lord Justice has said, to change a solicitor otherwise than upon the usual terms. The case of *Turner* v. *Letts* (1) is in point, in my opinion. What happened there was this: The executrix incurred certain costs and died. Then Lord Justice *Turner* said (2): "The Plaintiffs in the original suit, instead of applying in that suit for the delivery up of the deeds passed by the claim of the executrix to be indemnified against the costs of that suit, and, with the intention of defeating that claim, proceeded by a fresh bill in the name of the administratrix *de bonis non*, to recover the deeds. The effect of the decree of the Master of the Rolls is to take away from the executrix, or those who claim under her, the security for her expenses as trustee. If there had been no question as to the solicitors' lien, the residuary legatees could not have taken the deeds out of the hands of the executrix, except on the terms of indemnifying her against the costs of the other suit. It is said that there was nothing due to the executrix, and that she was, on the contrary, a debtor to the testator's estate; but this cannot be ascertained in the absence of any representative of the executrix." I do not understand it to be suggested here that Mr. *Hayward* is indebted to the estate, and think the case quite in point.

Solicitors: *Tilley & Soames; Sheffield & Sons; Bircham & Co.*

(1) 7 D. M. & G. 243. (2) 7 D. M. & G. 244.

Ex parte DIXON. *In re* HENLEY.

C. A.
1876
Nov. 30.

Set-off—Sale by Factor as Principal.

A person purchasing goods from a factor who sells them in his own name can set off a debt due to him from the factor personally in the same way as if the factor were the principal, unless the purchaser has notice that the factor is not the principal; and this right is not affected by the fact that the factor in selling in his own name without disclosing the agency is acting in contravention of the express directions of his principal.

Semenza v. *Brinsley* (1) explained.

Statement.

THIS was an appeal by *W. Dixon, Limited,* from a decision of Mr. Registrar *Spring Rice,* sitting as Chief Judge, rejecting a proof.

The debtor, *Henley,* was a wire maker and telegraph cable manufacturer, and made other articles in the iron trade. In the course of the year 1874 he had several transactions with *William M'Arthur & Co.,* iron and metal merchants, and ordered goods from them which he paid for by four-months' bills.

On the 24th of September, 1874, *Henley* ordered from *M'Arthur & Co.* twenty-five tons of *Calder* pig-iron. This particular kind of iron was manufactured by the Appellants, *W. Dixon, Limited,* of *Glasgow,* and *M'Arthur & Co.* were their sole agents in *London* for the sale of it, upon the terms contained in a letter addressed to *M'Arthur & Co.* by *W. Dixon, Limited,* on the 30th of December, 1872, the material part of which was as follows:—

"We agree to your acting as our sole agent in *London* for "*Calder*" and "*Govan*" pig-iron, and for "*Govan*" malleable iron, on the following conditions:—The commission upon pig-iron to be 1 per cent., and upon malleable iron 2½ per cent., at present, but subject to alterations from time to time as may be agreed upon. All sales to be made in accordance with the rules of the trade in *London,* and all payments made to you to be remitted to us as soon as received; bills to be made payable in such a manner as to shew your connection with us. This agreement to remain in force from 1 Jany. 1873, till 31 Dec. of the same year, and to be terminated on six months' notice at any date thereafter."

(1) 18 C. B. (N.S.) 467.

C. A. 1876 *Ex parte* Dixon. *In re* Henley. Statement.

The invoice, dated the 24th of September, for the above iron was made out in the name of *M'Arthur & Co.* to *Henley*, and did not in any way indicate the fact that *M'Arthur & Co.* were selling it as agents for *Dixon & Co.*

The iron having been delivered, *M'Arthur & Co.* on the 10th of October, 1874, drew on *Henley* a bill of exchange for the price, as follows:—

"£117 15*s.* 10*d.* "*London*, 10 Oct. 1874.

"Four months after date pay to our order the sum of one hundred and seventeen pounds fifteen shillings and ten pence, value received.

"To *W. J. Henley*, Esq. "*W. M'Arthur & Co.*

"Agents for W. Dixon, Limited,

"Calder and Govan Iron Works, Glasgow."

The words "Agents for *W. Dixon*, Limited . . . . *Glasgow*," were stamped or printed upon the bill with thin letters, in pale blue ink, and the signature, "*W. M'Arthur & Co.*," was partly written over them, so that it was very easy for a person to read the bill without observing them.

The indorsement was

"pp. *W. M'Arthur & Co.*

"*E. Prentis.*

"Pay the *Commercial Bank of Scotland* or order.

"William Dixon (Limited)."

The words "*William Dixon* (Limited)" were also stamped or printed in thin letters in pale blue ink.

Another similar transaction took place in the same year between *Henley* and *M'Arthur & Co.* as to *Calder* pig-iron, there being nothing on the documents to give notice of agency except the appearance, in the same manner as before, of the name of *W. Dixon, Limited*, on the bill of exchange.

The bills accepted by *Henley* were duly met by him. Ultimately, on the 25th of January, 1875, he gave *M'Arthur & Co.* a further order for *Calder* iron, for which an invoice amounting to £286 5*s.* 6*d.* was sent in. The iron was delivered, but *Henley*, having discovered that, owing to certain acceptances of his in the

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hands of *M'Arthur & Co.* having been negotiated to a greater extent than he had been aware of, *M'Arthur & Co.* were indebted to him, refused to accept the bill of exchange, which on the 22nd of February, 1875, had been sent to him for acceptance.

On the 31st of March, 1875, *Henley* stopped payment, and liquidation by arrangement was shortly afterwards agreed upon. *W. Dixon, Limited,* sought to prove for the above amount of £286 5*s.* 6*d.* The trustee rejected the proof, on the ground that *Henley* had dealt with *M'Arthur & Co.* as principals, and was entitled to set off a larger amount due from them to him, and the Registrar came to the same conclusion.

Statement.

Henley made an affidavit as follows:—

"I always fully believed that, in dealing with the said *W. MacArthur & Co.*, and particularly when I gave them orders for *Calder* and *Govan* pig-iron, I was dealing with principals and not with agents. I never heard anything to the contrary from the said *W. M'Arthur & Co.* or anybody else until Mr. *W. M'Arthur* called at my office on or about the 22nd of February, 1875, and from and after that date I never ordered any more of the said pig-iron from the said Messrs. *W. M'Arthur & Co.*" *Rogers,* the secretary of *Henley,* gave evidence to a similar effect, and neither of them was cross-examined.

Argument.

De Gex, Q.C., and *Bagley,* for the Appellants:—

The conditions which must be complied with in order to establish the set-off are shewn by *Semenza* v. *Brinsley* (1). They are, 1, that the sale should be made by a person entrusted with the possession of the goods; 2, that the agent should sell the goods as his own, and in his own name as principal, by the authority of the principal; and, 3, that the purchaser dealt with the agent as, and believed him to be, the principal in the transaction up to the time when the set-off occurred. We do not contend that the first condition was not complied with, but we say that neither of the others was. The second was not, for the agent was expressly directed to have the bills so drawn as to shew the agency. He therefore had not his principal's authority for selling the goods as

(1) 18 C. B. (N.S.) 467. 11 Jur. N.S. 409

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his own, and in his own name. As to want of notice, we say that the fact of agency sufficiently appears on the bills. A person who accepts a bill cannot be heard to say that he did not read what appears on the face of it. Notice of this kind is enough: *Borries* v. *Imperial Ottoman Bank* (1). The agent here cannot be considered a factor, for a factor is commonly understood to be a person entrusted with the sale of goods from abroad: *Baring* v. *Corrie* (2).

Hemming, Q.C., and *Jeune*, *contrà*, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the Registrar's order ought to be affirmed. It seems to me quite clear that every one of the requisites was proved. According to the ordinary course of dealing among factors, *M'Arthur* sold the goods in his own name and as his own goods. *Henley* swears, and *Henley's* agent swears (and they have never been cross-examined), that they dealt with *M'Arthur* as the principal, and in the belief that he was the principal, and that they never had any doubt upon the subject until the 22nd of February, 1875. The arguments of the Appellants are founded on a private communication between the principal and his agent, and on the form of certain bills of exchange. As regards third parties, the powers of an agent are measured by the apparent scope of his authority, and cannot be limited by any private communication with him. Then, as to the form of the bills of exchange, when I come to look at them, I think the argument amounts to nothing whatever, because, although there is something printed upon them as to agency, that is so written over with ink as to prevent anybody from noticing it—so written over that I had some difficulty in seeing what the meaning of the blue ink was. Then the bills are indorsed by *M'Arthur* as principal, making himself liable upon them to anybody into whose hands they might come. I, therefore, am satisfied that the requisites mentioned in the judgment of Mr. Justice *Willes* in *Semenza* v. *Brinsley* (3) have been fully complied with, and am of opinion that the order of

(1) Law Rep. 9 C. P. 38. (2) 2 B. & A. 137.
(3) 18 C. B. (N.S.) 467. 11 Jur N S 469

the Registrar ought to be affirmed, and the appeal refused with costs.

BAGGALLAY, J.A.:—

I am of the same opinion.

BRETT, J.A.:—

I am of the same opinion. It is argued that the conditions laid down by Mr. Justice *Willes* in *Semenza* v. *Brinsley* (1) are not fulfilled, on two grounds. First of all it was said that the agent was not a factor; and some limitation of the definition of a factor was suggested which I confess I never before heard of. The definition of a factor I thought always was that which is laid down in *Smith's* Mercantile Law, where it is said: "There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposition of property, and brokers, who are employed without being put into possession of the goods." As for limiting that definition by restricting it to persons entrusted with goods from abroad, I never before heard of such a limitation, and I think it must be rejected.

M'Arthur & Co., then, were factors, that is to say, they were the persons entrusted with the possession as well as the disposition of the property. Mr. Justice *Willes*, who had the greatest experience in mercantile law, says that the ordinary course of business is for factors (that is to say, persons who are so entrusted with goods) to sell in their own name. Now, the rule of law is, that the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very fact of entrusting your goods to a man as a factor, with right to sell them, is *primâ facie* authority from you to him to sell in his own name. Therefore, it not being shewn here that any limitation of that authority was made known to the person who was dealing with the agent, there is sufficient evidence as between the principal and such third party that the goods were to be sold by the agent in his own name as principal with the authority of the person who so entrusted him with the goods. That point, therefore, is made out. It is true that Mr.

(1) 18 C. B. (N.S.) 467.

C. A. 1878.

Justice Willes in *Summers* v. *Brierley* (7), states it to be necessary that the agent should have the authority of the principal for selling in his own name; but he was only dealing with a demurrer to a plea, and at the end of the judgment he says it was a great pity that the parties did not go on to try the facts; and if the facts had been tried, I have no doubt that as soon as he found that the agent was entrusted with the goods as a factor he would have held that that general authority given to him by the principal to sell in his own name, so far as anybody was concerned to whom some limitation of that authority was not disclosed. If therefore it made out that the agent sold in his own name with the authority of the principal. Then it is said that the person dealing should be shown to have believed that the agent was the principal in the transaction. Here Henley swears that he did believe it. It is urged that he must be taken to have known the contrary, for that the acceptances on the former transactions must, upon the face of them, have shown him that the agent was dealing as an agent. If the acceptances had shown it, that would have decided the case: but when you look at the bills you see that what is relied upon is put in such a form, so blindly and so written over, that it would be wrong to say that Henley must, by seeing the bills, have become aware of the agency. At all events, we cannot say the Registrar was wrong in finding that Henley's oath is correct; there is not enough on the face of the bill to shew us that it is not. Therefore the case is brought within the rules laid down by Mr. Justice *Willes*.

Solicitors: *Galpin, Kirby, & Miller*; *Nicholl & Worley*.

(7) 3 C. B. (N.S.) 647.

In re LAWRENCE.
EVENNETT *v.* LAWRENCE.

[1881. L. 128.]

Practice—Extending Time for Appealing—Ex parte Application—Rules of Court, 1875, Order LVIII. r. 15.

After the expiration of the time limited for bringing an appeal, special leave to appeal will not be given upon an ex parte application.

T. STEVENS, for the Plaintiff applied *ex parte* for leave to appeal from a decision of Vice-Chancellor Hall given in March, 1878. The question related to the construction of a will, and the decision followed that of the Lords Justices in *In re Hutchinson's Trusts* (1). That decision had since been reversed by the House of Lords in *Sugrue v. Gordon* (2). In *Brandon v. Brandon* (3), under the old practice, leave was given *ex parte* to appeal from a decree thirty years after it had been made. He referred to Rules of Court, 1875, Order LVIII., rule 15.

JAMES, L.J.—

I think that leave ought not to be given *ex parte*. The Respondents may have some good ground of objection, and they ought not to be put, in the first instance, to the expense of preparing for the hearing of the appeal. You must serve notice of motion asking for leave to appeal.

BAGGALLAY, J.A., and BRETT, J.A., concurred.

Solicitors: Fenning, Bilton, & Fenning.

(1) Law Rep. 1 Ch. 16.

(2) Law Rep. 7 H. L. 547.

(3) 1 H. & M. 24.

C. A.
1876
Dec. 11.

In re HEATON'S STEEL AND IRON COMPANY.

BLYTH'S CASE.

Paid-up Shares—Creditors—Issue—Certificate—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

There is no fraud on the part of a company towards a purchaser of shares in not registering a contract as to the issue of those shares as paid up.

The 25th section of the *Companies Act*, 1867, is in favour of creditors, and does not apply as between the company and the shareholders.

The issue of the certificate is not necessary to the issue of shares within that section.

Bush's Case (1) explained.

Statement.

BY the articles of association of *Heaton's Steel and Iron Company, Limited*, the capital of the company was to consist of £400,000, in 40,000 £10 shares; and all shares allotted or issued as the consideration for the purchase of any property were to be considered as fully paid up. By a contract under seal, dated the 4th of November, 1868, the company agreed to buy from *T. H. Noyes* certain letters patent in consideration of £200,000, in 20,000 shares of the company, which were to be deemed fully paid up. This contract was not filed with the Registrar. The 20,000 shares were entered in the register of the company in *Noyes's* name as fully paid up; and the certificates relating to them appeared to have been signed and sealed, but they were never issued. On the 20th of August, 1869, *Noyes* transferred fifty of these shares to *H. Blyth*, and the transfer was duly registered.

An order having been made for winding up the company, *Blyth's* name was placed by the Chief Clerk on the list of contributories in respect of these fifty shares, as unpaid shares.

The matter was adjourned into Court, and on the 20th of May, 1876, Vice-Chancellor *Hall* refused to remove *Blyth's* name from the list, on the ground that he must be taken to have known at the time when he purchased the shares the circumstances under which *Noyes* held them.

Blyth appealed.

(1) Law Rep. 9 Ch. 554.

C. A. 1876

BLYTH'S CASE.

Morgan, Q.C., and *E. Cutler*, for the Appellant, contended that the company had committed a fraud on *Blyth* in not registering the contract, and that he was not liable. Moreover, no certificates had been issued, and therefore the shares were not shares issued within the meaning of 30 & 31 Vict. c. 131, s. 25, which alone made him liable: *Bush's Case* (1).

Argument.

Dickinson, Q.C., and *Cracknall*, for the official liquidator, were not called upon.

JAMES, L.J.:—

Judgment, James, L.J.

This appeal must be dismissed. Mr. *Blyth* is, on his own authority, entered on the register as a shareholder, having purchased shares which *Noyes* was able to sell. As between *Noyes* and the company the shares were at that time paid-up shares within the meaning of the articles, but the contract was not registered according to the provisions of the *Companies Act*, 1867, sect. 25. *Blyth* is, therefore, a holder of unpaid shares, and is liable unless he can prove that the shares have been paid for in cash, or that the contract has been registered according to the Act, neither of which has been done.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. These shares had been allotted to *Noyes*, and were transferred by him to *Blyth*. It cannot be said that *Blyth* was in any way induced to buy them by any representation made by the company. He agreed to take fifty shares which he thought were paid up. Whether he has any remedy against *Noyes* is a thing with which we have nothing to do. But the question is whether, as between him and the official liquidator, he can be treated as owner of unpaid shares; and as there was no registration of the contract, we must hold that he can.

BRETT, J.A.:—

Brett, J.A.

It appears to me that those shares were created when they were allotted under the contract, without any reference to sect. 25 of

(1) Law Rep. 9 Ch. 554.

C. A. 1876

BLYTH'S CASE.

Judgment, Brett, J.A.

the Act of 1867, which does not apply to the creation of shares. They were then transferred to *Blyth* independently of the provisions of that section. He was then the holder of shares allotted by the company, and by them to be considered as paid-up shares. But in liquidation the 25th section, which was made for the protection of creditors, applies. Though the shares were on the face of them paid up, the shareholder is bound to pay the whole amount in cash unless he can bring himself within the latter part of sect. 25. But as the contract has never been registered, he cannot do so, and the shares must be treated as unpaid.

Then it was argued that he was induced by fraud to place himself in this position. But there was no fraud by the company, and nothing done by the company which could mislead him, and the 25th section, which was passed in favour of creditors, makes him liable.

In *Bush's Case* (1) the issue of the certificates was merely taken as evidence of the time when the shares were issued, but this must not be taken to mean that shares are not issued until the certificates are issued.

JAMES, L.J.:—

I think it desirable to say, as the Appellant appears to have been misled by the marginal note to *Bush's Case*, that the notion that shares are only issued when the certificates are issued is a blunder which could hardly be attributed to us.

Solicitors: *J. & R. Gole; Manning.*

(1) Law Rep. 9 Ch. 554.

In re DALGLEISH'S SETTLEMENT.

C. A.
1876
Dec. 15.

Trustee of Leaseholds—Intestacy—Vesting Order—Reappointment of Trustees previously appointed—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34.

Where a sole trustee of leaseholds had died intestate, and had no legal personal representative, and new trustees had been duly appointed under the settlement, the Court reappointed the same two persons trustees, and made an order vesting the leaseholds in them.

The decision of the Master of the Rolls reversed.

THIS was an appeal from a decision of the Master of the Rolls (1). Statement.

Under a settlement made on the marriage of Mr. and Mrs. *Dalgleish*, leaseholds became vested in a sole trustee, who had died and had no legal personal representative.

Two new trustees had been duly appointed under a power in the settlement, and a petition was presented praying that the leaseholds might be vested in them.

The Master of the Rolls held that he had no jurisdiction to make the order asked for; and he also refused the application of the Petitioner to amend the petition by praying for the appointment of a third trustee, and for an order vesting the estate in the three trustees. The application was now renewed before the Court of Appeal.

Hastings, Q.C. (*Tremlett* with him), for the Petitioner, referred to *In re Rathbone* (2), where the Court, having appointed two new trustees, made an order vesting in them the leaseholds of a trustee, who was deceased without any legal personal representative. In the present case, two new trustees had been appointed under a power in the settlement, and he therefore asked that the Court would reappoint the same two persons trustees, and would then make an order vesting the estate of the deceased trustee in them; and he asked leave to amend the petition with that object. Argument.

JAMES, L.J., said that the Petitioner might amend the petition as suggested, and that the Court would make an order appointing the same two persons trustees, and vesting in them the leaseholds Judgment.

(1) 1 Ch. D. 46. (2) 2 Ch. D. 483.

C. A. 1876

In re DALGLEISH'S SETTLEMENT.

for all the estate of the deceased trustee. But the usual affidavit of the fitness of the trustees must be produced.

BAGGALLAY, J.A., and BRETT, J.A., concurred.

1877. Jan. 11. The case was mentioned again this day, when the written consent of the trustees and an affidavit of their fitness were produced; and the Court accordingly made the order.

Solicitors: *Eardley-Holt & Co.*

C. A. 1876 *Dec.* 15.

HICKMAN *v.* UPSALL.

[1869 U. 16.]

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27), *s.* 42—*Mortgagee of Life Estate in Possession—Death of Mortgagor Tenant for Life—Presumption of Time of Death—Account of Rents and Profits.*

2 Ch. Cas 490 4 Ch. D. 847

In 1859 a suit for administration was instituted by the tenant for life under a will of certain leaseholds, who subsequently mortgaged her life interest. The mortgagee obtained, under an order made in 1860, liberty to enter, and did enter, into possession of the rents for the purpose of keeping down the interest on her mortgage, and paying the balance to the tenant for life. In March, 1866, the tenant for life left her home, and was never heard of afterwards. On a petition presented in 1875 by the persons entitled in remainder, it was held that, under the circumstances, the tenant for life must be taken to have died soon after June, 1866.

On a petition now presented by the same parties for an account of arrears of rent received by the mortgagee:—

Held (varying the order of *Hall*, V.C.), that the Petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, and that they were, therefore, entitled to an account of rents; but that there was no fiduciary relation between the mortgagee and the Petitioners, and, therefore, they were only entitled to arrears for six years before the filing of the petition.

Hicks v. *Sallitt* (1) commented on.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (2). The facts, which are more fully stated in the previous report, are shortly as follows:—

In 1859 *Sophia Hickman*, then *Sophia Upsall*, who was inte-

(1) 3 D. M. & G. 782. 11 Jur. N.S. 915. (2) 2 Ch. D. 617.

rested beneficially, under the will of *John Upsall*, in certain leaseholds and funds, instituted a suit for the purpose of making the trustees liable for not getting in and investing a certain debt, and of having the trusts of the will administered by the Court.

Sophia Hickman, in July, 1859, assigned to *C. M. Samson* her life interest under the will, and also a policy of insurance on her life, to secure the repayment of money lent to her with interest. The same life interest was further charged, and two new policies were assigned in August, 1859, and January, 1860, to secure further sums lent by *C. M. Samson*.

By an order made on further consideration, dated the 9th of November, 1860, *C. M. Samson* had liberty to enter into possession of the leaseholds, and without the intervention of the trustees to pay herself the sum due in respect of her securities, and thereout to keep down the interest on the mortgage and premiums on the policy, and to pay the residue to *Sophia Hickman*. She accordingly entered into possession of the leaseholds.]

Sophia Hickman, on the 25th of March, 1866, left her home and was never heard of again. In 1875 a petition was presented by the present Petitioners, who were the persons entitled in remainder under the will, for the purpose of having the trust funds transferred to them, and the leaseholds sold and the proceeds paid to them.

The petition was ordered to stand over for a month in order that inquiries might be made for *Sophia Hickman*. On the petition coming on again, on the 16th of April, 1875, it was held by Vice-Chancellor *Hall* that, under all the circumstances, it was to be presumed that *Sophia Hickman* died soon after June, 1866, and that, therefore, nothing became payable to the mortgagee after that time. The accumulated dividends on the funds, as well as the funds themselves, subject to payment of costs and duty, were ordered to be divided among the Petitioners, and the leaseholds ordered to be sold (1).

C. M. Samson paid the premiums on the policies of insurance, and ultimately received the policy-money from the insurance company.

The present petition was presented on the 10th of March, 1876,

(1) Law Rep. 20 Eq. 136.

C. A. 1876. HICKMAN v. UPSALL.

praying that an account might be taken of all rents and other sums which had been received by the mortgagee, *C. M. Samson*, since the month of July, 1866, and that what should be found due on such account might be distributed among the Petitioners in the proportions stated in the petition.

The Vice-Chancellor granted the order prayed, and from this decision *C. M. Samson* appealed.

Argument.

Methold, for the Appellant:—

We contend, in the first place, that *Sophia Hickman* cannot be presumed to have died till the expiration of the period of seven years after she disappeared.

In the second place, we say that if she is presumed to have died in 1866, the Petitioners cannot have an account of rents before the filing of the petition. The petition is in the nature of an equitable ejectment, and the rule of the Court of Chancery in such a case is that the Plaintiff can only have an account of rents from the institution of the suit: *Hutton* v. *Simpson* (1). The cases where an earlier account has been decreed are all cases in which there were some equitable considerations on which the Plaintiffs based their claim. In *Hicks* v. *Sallitt* (2) Lord Justice *Turner* thus states the result of the authorities: "In cases of adverse possession, where there is no trust, no infancy, no fraud, no suppression, where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the Court to carry back the account of rents beyond the filing of the bill." The present is a simple case of *bonâ fide* adverse possession. There was no trust or fiduciary relation; *C. M. Samson* was allowed to take possession as mortgagee, which she could have done in her own right if it had not been for the suit. There was no privity between her and the Petitioners. She was exactly in the same position as an ordinary tenant *pur autre vie*, holding over after the life has dropped.

If *Sophia Hickman* is presumed to have died in 1866, the right of the Petitioners must be supposed to have commenced at that time, and they are guilty of laches in not coming till 1875. They might have applied under the statute 6 Anne, c. 18, for the pro-

(1) 2 Vern. 722. (2) 3 D. M. & G. 813.

duction of the tenant for life, and the onus would have been thrown on *C. M. Samson* to produce her. No doubt they were equally with *C. M. Samson* ignorant of what had become of the tenant for life, but ignorance does not prevent a person being barred of his claim by lapse of time if there is no fraud or concealment. At all events, the Petitioners can only recover arrears for six years under the 3 & 4 Will. 4, c. 27, s. 42.

E. Cutler, for the Petitioners :—

The Vice-Chancellor was justified in holding that the tenant for life must be supposed to have died soon after June, 1866. The presumption of death does not arise till seven years have elapsed, but when that presumption has arisen it is a mere question of evidence at what point of time the death took place. On the supposition that the death took place in June, 1866, we are entitled to claim an account of the back rents from that period. *Hicks* v. *Sallitt* (1) does not bear out the contention of the Appellant. On the contrary, the rule clearly laid down there is that unless there is laches or unfair dealing the party in possession is to account for the rents during the whole period of the adverse possession. All the cases are consistent with this view: *Thomas* v. *Thomas* (2). In the present case there has been no laches. Until 1875 we knew nothing of the circumstances; and if we had, we could not have recovered possession merely by shewing that the tenant for life had disappeared, until seven years had elapsed. The statute of *Anne* referred to only applies to legal estates.

Moreover, the Appellant was in a fiduciary relation to us. She was put into possession by the Court, and, subject to keeping down her own interest and paying the premiums, she was a trustee for the persons really entitled. The 42nd section of the 3 & 4 Will. 4, c. 27, therefore, does not apply, and we are entitled to the whole arrears since 1866.

Method, in reply, referred to *Pulteney* v. *Warren* (3); *Morgan* v. *Morgan* (4).

(1) 3 D. M. & G. 782. 18 Jur. 915
(2) 2 K. & J. 79.
(3) 6 Ves. 73.
(4) Law Rep. 10 Eq. 99.

C. A. 1876 HICKMAN v. UPSALL. Judgment, James, L.J.

JAMES, L.J.:—

In this case the Vice-Chancellor was of opinion that the tenant for life must now be presumed to have died soon after June, 1866, but that it would have been impossible to make such a presumption till after the expiration of seven years from the time when she was last heard of; that is to say, that the circumstance of her going away and not appearing to receive her income in June, 1866, was not in itself sufficient to justify the Petitioners in acting on the presumption of her death so as to enable them at that time to apply to be let into possession of the property; but now, taking the circumstances under which she disappeared, together with the presumption which has arisen at the end of seven years, he has come to the conclusion from these circumstances, not only that she is dead, but that she died soon after June, 1866. I think he was right in that way of dealing with that part of the question before us. So it came to this, that the Petitioners could not be guilty of laches in not having brought forward their claim before the expiration of the seven years. If they had done so, their petition must have been dismissed with costs. There was, therefore, no laches, and there was no knowledge possessed by one party that was not possessed by the other. Both sides were in an equal state of ignorance. Now it appears to me, looking at the rule as laid down in *Hicks* v. *Sallitt* (1), that the principle of the rule is, that in order to disentitle the Plaintiff to an account of rents before the institution of the suit there must be neglect in bringing the suit when they could have brought it. In the present case the position was this: After the death of the tenant for life a person claiming under her remained in possession, holding over after the death of the tenant for life, not improperly, but not knowing of her death. There was no fiduciary relation between her and the remainderman; she was the mortgagee of the tenant for life, and although she was allowed to take possession, the relation of the parties was not different from what it would have been if the mortgagor had been allowed to keep possession. There was no more fiduciary relation between them than there is between an ordinary tenant *pur autre vie* and the remainderman. If this had been a legal claim, the legal remainderman would have been entitled to

(1) 3 D. M. & G. 782. 18 Jur. 915.

eject the person in possession and to recover six years' arrears of rents. That is the analogy which I think we ought to adopt in this case, there being here no equitable considerations affecting the parties. I am of opinion, therefore, that the account must be carried back for six years before the filing of the petition.

BAGGALLAY, J.A. :—

Judgment, Baggallay, J.A.

I am of the same opinion.

BRETT, J.A. :—

Brett, J.A.

Our decision depends upon the question when *Sophia Hickman* died. The fact of her not appearing to receive her income was not sufficient evidence of her death; it was not so after the first quarter-day: it was not so after the second quarter-day. In truth there was no presumption till she had disappeared for seven years; but after seven years, having got the fact that she was dead, you have a right to look back and inquire into all the circumstances and ascertain when she died. Suppose a person intending to return home at ten o'clock at night does not appear, there is no presumption that he is dead. But if after a week he is found with his skull broken in a wood, you can then conclude that he was killed before ten o'clock on the night on which he disappeared. So, in the present case, I think the Vice-Chancellor was right in concluding that this lady died at the time at which he says she died.

Then we come to the question when this claim ought to have been made. If what I have said be correct, it is clear that this petition could not have been brought before seven years after the disappearance of the tenant for life. It is argued that the question of laches is no ingredient in this case; but if that were really so, I should think equity was more unjust than the law was ever thought to be. For to say that the mere fact of a person not bringing his suit, although he does not know any of the facts, should preclude him from relief, is against every principle of justice. I do not believe there is any such rule in equity. I think it is equitable that the Petitioners should have six years' arrears of rent, and that the account should be confined to that time.

Solicitors: *J. & R. Gole; Proudfoot.*

C. A.

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C. J. B.
Aug. 7.

C. A.
Nov. 23, 30.

7 Ch D. 61-4
4 B D 358

In re MAPLEBACK. *Ex parte* CALDECOTT.

Bill of Sale—Validity—Illegal Consideration—Compounding a Felony—Stifling a Prosecution.

In January, 1875, *M.*, who then owed *B.* £100, for which he had given no security, wrote to *B.* telling him that he had forged his name to a bill of exchange for £100, which he had discounted with his bankers; that the bill was just due and that he was unable to meet it; and entreating *B.* to pay the bill, and thus save him and his family from the ruin which would result from exposure. *M.* promised, if *B.* would do this, to give him a bill of sale of all his property to secure what he owed him. *B.* acceded to the request; a bill of sale of all *M.'s* property was given to him to secure £200, and *B.* paid the £100 to the bankers. Soon afterwards *M.* was adjudicated a bankrupt:—

Held, by the Chief Judge, that the transaction amounted to the compounding of a felony, that the bill of sale was void as against the trustee in the bankruptcy, and that *B.* must pay over the proceeds of the goods to the trustee.

Held, on appeal, that, however difficult on grounds of public policy the position of *B.* might have been if he had been seeking the assistance of the Court, *M.*, who was a party to the offence, if any, could not have recovered the proceeds of the goods from *B.*; and that as no offence against the bankrupt law had been committed, the trustee had only the same rights as *M.*

Statement.

JAMES MAPLEBACK was a farmer. Prior to the month of January, 1875, *Henry Butt* had lent *Mapleback* from time to time various small sums of money, amounting altogether to about £100, without any security. On the 16th of January, 1875, *Mapleback* wrote a letter to *Butt* as follows:—

"Dear Sir,—I wanted to have seen you again to-day, but could not find you. I have placed myself entirely in your power to get me sent to prison, but I hope, for the sake of my wife and family you will not do it, for it will ruin them for life as well as me. You know I am dreadfully worried for money. I owed £100 at the bank and they wanted security, and I put your name to a bill with mine, and the bill was due this week and I cannot meet it, and the manager is going to write to you about it to-night. But don't, pray, let him know but what you signed the bill, or they will transport me, and then what will become of my family? I know it was a very wrong thing of me to do, but I didn't know

what to do, I am so worried about it, and have not been able to eat or sleep since. Dear Sir, if you will do this for me, I shall never know how to make amends to you. If you will pay the money I will give you a bill of sale on all I have got for what I owe. Do pray right to-morrow and tell me what you will do, but pray don't let the bank people know, or any one. I hope you will do this for me, or I and my children will be ruined for life. Don't let anybody see this, please. Do this great kindness for me . . .

I am, dear sir, yours,

"(Signed) *J. Mapleback.*"

After receiving this letter *Butt* had an interview with *Mapleback*, and he then agreed to pay the bill for £100 to the bankers on condition of *Mapleback* giving him a bill of sale to secure the £100 and the previous debt of £100. Accordingly, on the 20th of January, 1875, *Mapleback* executed a bill of sale, which contained a recital that he was indebted to *Butt* in the sum of £200, and that he had agreed to secure the same in manner therein appearing, and by which he assigned to *Butt*, by way of mortgage, all his household furniture and household effects, stock in trade, crops, implements, and utensils in husbandry, and all other his personal property (except the necessary wearing apparel of himself and his family). After the bill of sale had been executed, *Butt* paid the £100 to the bank. In February, 1875, *Butt* took possession under the bill of sale, and sold enough of the debtor's property to satisfy the amount due to him. On the 15th of March, 1875, *Mapleback* was adjudicated a bankrupt on a petition presented on the 8th of March, the act of bankruptcy alleged being the execution of the bill of sale. On the 15th of May, 1876, the trustee in the bankruptcy gave notice of an application to the *Southampton* County Court for an order declaring the bill of sale to be void on the ground that its execution was an act of bankruptcy, and that *Butt*, in accepting it, compounded a felony committed by the bankrupt. The Judge held that the bill of sale was valid, and that *Butt* was entitled to retain the proceeds of sale; and he ordered the trustee to pay the costs of the application, and also that the adjudication should be annulled.

The trustee appealed to the Chief Judge, and the appeal came on for hearing on the 7th of August, 1876.

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Argument.

De Gex, Q.C., and *Rolland*, for the Appellant:—

The transaction as to the bill of exchange amounted to compounding a felony, and on that ground the bill of sale is void: *Wallace* v. *Hardacre* (1); *Ex parte Hibernian Banking Company* (2); *Williams* v. *Bayley* (3). *Butt's* duty was to prosecute the bankrupt for the forgery: *Collins* v. *Blantern* (4), and instead of doing this he engaged in a transaction which is contrary to the policy of the law. He did this for the purpose of obtaining security for his old debt. The whole transaction was illegal and void, and the bill of sale remains only as an assignment of all the bankrupt's property for an antecedent debt. It is therefore void as an act of bankruptcy.

F. O. Crump, for *Butt*:—

Butt acted with perfect *bona fides* in paying the bill of exchange and accepting the security. All he did was to ratify the use which the bankrupt had made of his name. He received no benefit as a consideration for stifling a prosecution; on the contrary, he advanced money for the benefit of the bankrupt, and thus relieved his estate from a liability. The essence of the illegality of a transaction of this nature is the stifling of a prosecution, as Lord *Ellenborough* said in *Wallace* v. *Hardacre*. That case shews that there is nothing wrong in substituting a good security for a forged one, and in *Williams* v. *Bayley* that decision was approved. There was no agreement to stifle a prosecution in the present case as there was in *Williams* v. *Bayley*. The bank did not enter into any agreement with the bankrupt not to prosecute him, nor did *Butt*. The payment of the £100 bill of exchange was a sufficient fresh advance to validate the bill of sale: *Ex parte King* (5).

Judgment, C. J. B.

BACON, C.J.:—

A case so plain as this has never been presented to me, or, I believe, to any other Court. I thought it was the duty of every citizen of these realms, if a crime was committed against him, to

(1) 1 Camp. 45.
(2) 14 Ir. Ch. Rep. 113.
(3) Law Rep. 1 H. L. 200.
(4) 2 Wils. C. P. 347, 349.
(5) 2 Ch. D. 256.

prosecute the offender. That is a *primâ facie* duty. I thought it was unlawful for him to sell that duty, or to make a bargain about it. In the present case it has been most abundantly established that this has been done, and I repeat that to sell that duty is unlawful, and an offence against public policy. Upon that ground the bargain here made is one that has not the slightest portion of validity in it, and on that ground the bill of sale is utterly void. The man who had committed the forgery wrote to the person whom he had made his victim saying, "If you will pay this debt which I have wrongfully contracted in your name, I will give you security for it." A more vicious transaction can hardly be suggested. The Respondent, I daresay very good-naturedly, paid the £100 to the bank. If he had not paid it a prosecution might or might not have taken place. But a crime had been committed, and the duty of prosecuting the offender had devolved on the Respondent. He neglected that duty, and advanced £100 to the bankrupt, that is to say, he paid a debt of the bankrupt's, making him no advance that could be called an equivalent for the security, nothing that enabled him to carry on his business. He paid a debt which, as well as his own debt, had been previously contracted, and then he took as security this bill of sale which was utterly invalid from its beginning.

If that was not enough to dispose of the case, the execution of the bill of sale was a clear act of bankruptcy, because without any reason, except to avoid the consequences of his own criminal act, the debtor agreed to give a bill of sale comprising the whole of his property to satisfy a previously existing debt. Anything more plainly fraudulent under the statute of *Elizabeth*, or under the *Bankruptcy Act*, cannot be imagined. How the conclusion of the Court below was arrived at I am at a loss to understand, unless it was suggested with success to the Judge that the Respondent did not know the consequences of the offence that had been committed, and had no intention of screening the debtor from the prosecution which might have taken place. That an adjudication of bankruptcy made under such circumstances should be annulled is directly at variance with the usual course of proceedings in bankruptcy. I consider the decision of the Court below altogether wrong. The Respondent must refund the money. The order must

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be discharged, and a proper order must be substituted for it. The Respondent must pay the costs in the Court below, as well as the costs of this appeal.

Butt appealed from this decision, and the appeal came on to be heard on the 23rd of November, 1876.

Argument.

Miller, Q.C., and *F. O. Crump*, for the Appellant:—

We contend that this is a good bill of sale, supported by a sufficient present advance. There was no compounding a felony, nor misprision of felony. The essence of compounding a felony is getting a benefit by agreeing to stifle a prosecution: *Wallace* v. *Hardacre* (1); *Keir* v. *Leeman* (2). Even if the transaction was bad, the bankrupt could not have recovered the money back: *Williams* v. *Bayley* (3); and his trustee cannot be in any better position than himself; for, at all events, there was no offence against the bankrupt laws.

De Gex, Q.C., and *Rolland*, *contrà*:—

It is illegal to make a profit out of a felony. Here *Butt* got the benefit of obtaining a security for a previously unsecured debt. The case falls precisely within the language of Lord *Westbury* in *Williams* v. *Bayley* (4). It was *Butt's* duty to prosecute the bankrupt for the forgery: *Collins* v. *Blantern* (5); instead of which he took steps to enable the bankrupt to conceal his offence, and by means of this he got a benefit. The bill of sale, therefore, is founded on an illegal arrangement, and is void as a fraudulent preference: *Ex parte Hibernian Banking Company* (6).

Miller, in reply:—

[BRAMWELL, J.A:—Can you take a security for money advanced to a man for the purpose of enabling him to conceal a felony, and sue on that security?]

I submit that we can, there being valuable consideration.

[BRAMWELL, J.A.:—Suppose the case of a brougham hired for

(1) 1 Camp. 45.
(2) 9 Q. B. 371, 395.
(3) Law Rep. 1 H. L. 200.
(4) Law Rep. 1 H. L. 221.
(5) 2 Wils. C. P. 347, 349.
(6) 14 Ir. Ch. Rep. 113.

immoral purposes, or money lent to a burglar for the purpose of buying housebreaking tools?]

There the object of the transaction is to enable a person to commit an offence.

[JAMES, L.J.:—It comes to this—Is a loan on purpose to enable a forger to take up a forged bill legal?]

I submit that it ought to be held so, unless the lender is a person who has threatened a prosecution. In *Williams* v. *Bayley* (1) the securities were got merely in consideration of forbearing a prosecution. The further advance is sufficient: *Ex parte Reed & Steel* (2).

Nov. 30. JAMES, L.J., delivered the judgment of the Court (*James*, L.J., *Baggallay*, J.A., and *Bramwell*, J.A.) as follows:— Judgment, C. A.

The Appellant complains of an order of the Chief Judge by which he was ordered to pay to the trustee of the bankrupt the produce of certain goods seized and sold by him.

They were so seized and sold under a bill of sale duly registered by which the goods had been assigned.

The consideration for the bill of sale was £100 then advanced and £100 previously due. It is not questioned that the £100 was so previously due, and that there was really and truly advanced the further sum of £100.

The right of the Appellant, which on this short statement of facts would seem unquestionable, is impeached on the following ground: Before advancing the second £100 the lender had received from the bankrupt a letter in the most piteous terms, informing him that a bill was becoming due at a banker's which bore the signature, forged, of the lender, and that the bank would, on dishonour of the bill, of course apply to the latter, which would lead to a discovery of the crime with all its consequences of punishment to the forger, and ruin to himself and family. In the same letter he offered, if the advance were made, to give a security as well for that as the previous debt. Moved by this letter, the Appellant lent the money, which was applied in taking up the bill, and the security was given, as promised, for that advance and

(1) Law Rep. 1 H. L. 200. (2) Law Rep. 14 Eq. 586.

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the previous debt. The Chief Judge was of opinion that the lending of the money under those circumstances was such a violation of public policy as to taint and avoid the whole security, and to make it impossible to allow the Appellant to retain the proceeds of it, although actually realized and received by him. If the Appellant had been Plaintiff or claimant, he certainly would have been in a very difficult position. It was not compounding a felony; it might perhaps not have been strictly a misprision of felony, but it was a transaction which was intended to result, and did result, in preventing the discovery of a felony, and getting into the criminal's own hands the most important piece of evidence. It is, however, not necessary to express any actual judgment on how the case would have stood if the Appellant had been Plaintiff.

But there is another consideration which appears to us sufficient to dispose of this case. If there was a legal misdemeanour, the bankrupt was a party to it. *In pari delicto, potior est conditio possidentis aut defendentis.* The bankrupt could not have recovered back the proceeds of the sale of the goods, and his trustee cannot be in a better position than the bankrupt. If the bankrupt had repaid the loan the trustee could not recover it. If the bankrupt had actually given money as a bribe, or parted with property for any other illegal purpose, his trustee could not recover it back any more than he could himself. This is not one of the cases in which the trustee in bankruptcy stands in a better position than the bankrupt. For, however wrong the transaction may have been in law, it was no wrong against the bankrupt law; there was nothing done with intent to delay or defeat creditors, or to defraud any one. For all purposes of the bankrupt law, the bill of sale was a bill of sale for a past debt, and a sufficient present advance. And except where there is an offence against the bankrupt law, or against some law in favour of creditors, the trustee is merely the legal representative of the debtor, with such rights as he would have had if not bankrupt, and no other.

The order of the Chief Judge was accordingly discharged.

Solicitors: *Palmer, Bull, & Fry; J. Lott.*

In re TAYLOR, AN INFANT.

M. R.
1876
Nov. 4.

Mother's Custody of Infant—Misconduct of Father—Desertion—Custody—36 & 37 Vict. c. 12—Talfourd's Act.

A husband having abandoned his wife and kidnapped the only child of the marriage, a boy three years of age, and being co-respondent in a pending divorce action charging him with adultery,

The Court, upon the wife's petition under the *Infants Custody Act*, 1873 (36 & 37 Vict. c. 12), ordered immediate delivery of the child to her, with liberty of access by the father and paternal grand-parents, and also liberty to apply as to the maintenance and education of the child on his attaining seven years of age.

The principles which guide the Court in cases under the Act, considered.

Statement.

THIS was a wife's petition, by her next friend, under the *Infants Custody Act*, 1873 (36 & 37 Vict. c. 12), praying for a declaration that she was entitled to the care and custody of her child, a boy three years of age, the only issue of her marriage, and for an order on her husband to deliver him up to her forthwith, and for an injunction to restrain the husband from removing the child out of the jurisdiction and depriving her of the care and custody of the child when delivered to her, and from in any way interfering with her custody and management of him.

The Petitioner stated that her husband abandoned his home in June last, and had since refused to return to it, in spite of her repeated earnest entreaties that he should do so; that in October last he kidnapped the child; that she had never seen or heard of the child since, and that he was in fact secreted from her by her husband. She stated, moreover, that an action was pending in the Divorce Court, in which her husband was made co-respondent on a charge of adultery with another man's wife. As to her means of supporting the child, she stated that she had a small separate income of about £60 a year, which, supplemented by pecuniary aid readily obtainable from her relations, would enable her to provide for and maintain him.

In opposition to the petition, the husband alleged that his wife was a person of a violent and jealous temper, and unfit to be entrusted with the custody of the child; that neither he nor his

M. R. 1876 *In re* TAYLOR, AN INFANT. Statement.

wife had the means of properly educating the child or placing him out in the world, he himself being almost entirely dependent upon his father, a gentleman of good position and large fortune, who was ready and willing to maintain, educate, and provide for the child, and was therefore the best person to take charge of him. With regard to the charge of adultery, the husband said he was advised not to notice it, further than to submit that inasmuch as it was the subject of a pending action his wife's allegation of it was scandalous.

The husband's father also filed an affidavit stating that the Petitioner was unfitted, by her defects of temper, to direct the child's training and education, and that his being left in her care would in all probability act injuriously on his prospects and fortune, which were to a large extent dependent upon him, the deponent: and he prayed that he and his wife, who were both much attached to the child, might be allowed to take him under their care and custody, or at all events to have some control over his training and education.

In reply to this affidavit, the Petitioner stated that she had never before heard any complaint made by her father-in-law of any defect of temper on her part, but that, on the contrary, he had always displayed great kindness towards her, and she disclaimed any objection to the child visiting his grand-parents, subject to the direction of the Court.

Argument.

Chitty, Q.C., and *Phear*, for the Petitioner:—

The case is a proper one for the interference of the Court, the child being an infant three years of age, and there being no imputation of misconduct against the mother. The petition is presented under the *Infants Custody Act*, 1873, under which a mother can obtain the custody of her child until sixteen years of age. That Act repeals *Talfourd's Act* (2 & 3 Vict. c. 54), which fixed seven years of age as the limit.

Roxburgh, Q.C., and *E. Cutler*, for the Respondent, the husband:—

The evidence on the part of the Petitioner is not sufficient to induce the Court to interfere and deprive the father of his natural

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right to the custody of his child. The case appears to be merely one of incompatibility of temper. No misconduct has been proved against the husband. This case is not within the purview of the Act, the object of which is to protect mothers from the tyranny of husbands who ill-use them: *Warde* v. *Warde* (1). The authorities shewing on what grounds the Court will interfere on behalf of the mother are collected in *Simpson* on Infants (2). At all events, we submit that, under the circumstances of this case, the grand-parents should be entrusted with the custody of the child in preference to the mother.

Judgment.

JESSEL, M.R.:—

First of all, I have to consider what the law is. What the law was is clear. Before the passing of the Act commonly known as *Serjeant Talfourd's Act*, there is no doubt that you could not take away the custody of a child from its father except you shewed that either he was unfit to remain the custodian of the child, or that his so remaining would be an injury to the child. You had to shew either the one case or the other. That was the result of the authorities. But the Act took away that right of the father in the most express terms, for the Act was confined to the cases where the child was in the sole custody of the father, and it gave to the then Court of Chancery the jurisdiction which is now transferred to the High Court of Justice, that is to say, in terms an absolute discretionary power as to the custody of the infant on the application of the mother, when the child was under seven years of age, and this power was by a recent Act, passed in 1873, extended to cases where the child was under sixteen years of age. Therefore the law was altered by *Talfourd's Act* to this extent, that that which was formerly the absolute right of the father became, and is now, subject to the discretionary power of the Judge. When I say "the discretionary power of the Judge," I mean that, though the Act of Parliament gave the power in the most ample terms in which language could express it, "if he should see fit"—or, as the recent Act expresses it, "as the Court shall deem proper, or shall direct"—yet, of course, like every other power given to a Judge, the

(1) 2 Ph. 786. (2) Pages 138, 148, 149.

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discretion of the Judge is to be exercised on judicial grounds—not capriciously, but for substantial reasons.

Soon after the passing of *Talfourd's Act* it became necessary to consider what should be the guiding rules as regards this discretion; and one ground was that put by Lord *Cottenham* in *Warde* v. *Warde* (1), who said that one object of the Act was to prevent the husband making use of the guardianship of the children, not for its legitimate object, namely, the proper maintenance and education of the children, but for the purpose of putting pressure on the wife, and compelling her to forego her legal rights and remedies against him in cases of his misconduct, or in cases in which he wished to appropriate to himself property which by law was hers, or had been her separate property; or otherwise to control her in the disposition either of her person or her property. That was, no doubt, one motive, but that was not the only motive; there were others.

Another motive was obvious enough, namely, that whereas the Courts had refused to deprive the father of the custody of the child except in a very extreme case of misconduct, in future, where the wife was innocent, the Court was to exercise a wider discretion, and consider other reasons besides; and Sir *George Turner*, in considering, in *Re Halliday's Estate* (2), the rule of the Court applicable to that case, said there was to be kept in mind, first of all, the paternal right; secondly, the marital duty; and, thirdly, the interest of the children.

Now it is quite plain that the two latter considerations were the grounds which induced the Legislature to interfere. The father had already sufficient protection by the common law. His rights were certainly large enough. Marital misconduct of a gross character, if it injured the children, was certainly provided for before, and therefore what the Legislature intended to provide for was the protection of the wife and children—for the petition was to be the wife's; and the child, of course, must have its interests protected and cared for: in other words, the only alteration in the law was, that you could have the custody of the children given to the wife; that is to say, she was the only person who acquired new rights; but of course, in deciding who is to have the custody

(1) 2 Ph. 786. (2) 17 Jur. 56.

of the children, you must have a great regard to the interests of the children.

Well, that being so, what is the case before me? It is a painful case, as most of these cases are.

The husband has abandoned his home and his wife for a long period, that is to say, for several months. He has abandoned her under circumstances which are suspicious as regards his own conduct, for it seems that shortly after that abandonment a suit in the Divorce Court was instituted against him by another gentleman, who alleged adultery with his wife. That suit is now pending. I do not wish any observation of mine to prejudice that suit in the least degree, and therefore I shall refrain as much as possible from making any observations upon it; but I must say that it does not lie in the mouth of a husband—who under these circumstances can only say that because the suit is pending he is advised by his solicitor to make no reference to the charge to which that suit relates—to accuse his wife of being jealous, or of exhibiting a jealous temper, even if she had done so. On the other hand, the wife says that as far as she is concerned, she hopes that the charge will be disproved, and she is willing to receive her husband back if he chooses to return home. Then what is the age of the child? The child is a little boy, rather more than three years old. What is the interest of the child? Who is likely to take the most care of him—the mother or the father—under the circumstances existing in this case?

As regards means, the mother has an income of £60 a year and the father has nothing. The father has a wealthy father, who will maintain him. The mother has friends, she says, who will maintain her. Well, in that respect they are both upon a par.

I have no reason to doubt that the grandfather of the child will himself come forward, if necessary. I think, considering his position as a wealthy man, that he would not allow the child to starve whatever order I made; for both the paternal grandfather and the paternal grandmother are on terms of intimate friendship with their daughter-in-law, the mother of the child, and obviously wish well to her, and would be glad if she were well provided for. I do not for a moment hesitate in saying that I am satisfied that if I make this order the child will be properly maintained and educated;

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but, inasmuch as I must regard the interests of the child, if it should appear that the child is not properly provided for or educated, I will give leave to apply.

The next point that was urged upon me was that I was depriving the father of all control over the child. I do not intend to do anything of the sort, for I intend to give him free access to the child, and the grandfather and grandmother also, at all reasonable times. I should be very sorry that anything should alienate the child from the father or the father from the child, and if he has that right of access it appears to me he has got all that he is entitled to under the circumstances of this case. Of course, if the father and mother come together again, it is very easy to apply to the Court. Therefore, I intend simply at present to give the custody of the child to the mother until further order, and, by analogy to *Talfourd's Act*, to give the father liberty to apply again with reference to a scheme for the education of the child when he attains the age of seven years; but I do not mean to intimate that I shall necessarily take away the custody of the child from the mother at that period. That must depend on the circumstances under which the application (should one become necessary) is made.

His Lordship then made an order for immediate delivery of the child to the mother, with liberty of access at reasonable times by the father, and the paternal grandfather and grandmother, and also with liberty to apply for a scheme for the maintenance and education of the child on his attaining seven years of age. The Respondent to pay the costs of the petition.

Solicitors for Petitioner: *Woodrooffe & Plaskitt.*
Solicitors for Respondent: *Kynaston & Gasquet.*

HENDERSON *v.* MAXWELL.

M. R.
1876
Nov. 9.

[1875 H. 10a.]

Copyright—Periodical—Infringement—Separate Publication of Serial—5 & 6 Vict. c. 45, ss. 18, 19, 24.

A periodical or magazine is a book within the meaning of sect. 24 of 5 & 6 Vict. c. 45, and its proprietor, if he has, pursuant to sect. 19, registered the first number at *Stationers' Hall*, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under sect. 18, although neither the serial nor the first number containing it has been separately registered.

Statement.

THE Plaintiff in this case was the proprietor of a periodical or magazine called *The Orb*, and employed *C. Gibbons* to write a serial story called *The Verger's Daughter*, for publication in successive numbers, upon the usual terms that the copyright should belong to and be paid for by the Plaintiff. The first number of *The Orb* was duly registered at *Stationers' Hall*, as provided in 5 & 6 Vict. c. 45, s. 19.

After the serial had been thus published in *The Orb*, the Defendant, without the Plaintiff's written consent, published for *Gibbons* the same work under the name or title of *Dangerous Connections*, and the object of the present action was to restrain its publication by the Defendant as being an infringement of the Plaintiff's copyright.

Argument.

Chitty, Q.C., and *Rigby*, for the Plaintiff.

Davey, Q.C. (*Romer* with him), for the Defendant, took the objection that the Plaintiff, having only registered at *Stationers' Hall* the first number of the magazine, but not the first number of the serial in question, was not protected by sects. 18 and 19 of the Act 5 & 6 Vict. c. 45, and that he had no right to restrain the Defendant from publication of the serial in a separate form.

Judgment.

JESSEL, M.R.:—

I think there is nothing at all in this objection. The 18th section in effect gives the proprietor of a periodical a copyright

M. R. 1876 HENDERSON v. MAXWELL. Judgment.

in the periodical. The result, therefore, is, that nobody can take any part of a periodical, whether it is the whole of an article or part, and publish it. The 19th section provides that the proprietor of the copyright in a periodical, if he registers the first number, shall be entitled to all the benefits of registration under the Act. The 24th section provides "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action . . . in respect of any infringement of such copyright, unless he shall, before commencing such action, have caused an entry to be made in the book of registry of the *Stationers' Company* of such book," and so on. Here the proprietor of the copyright of a periodical seeks to restrain a separate publication of an article which is part of that periodical; but I am told that he cannot maintain the action until he has registered that article or the first number of the serial, and the date. That is out of the question. A periodical is a book within the meaning of the Act, but the article or serial would be only part of the book, and it is unnecessary that it should be separately registered.

Solicitors: *Crowdy & Son; Linklater & Co.*

M. R. 1876 *Nov.* 10.

WRIGHT *v.* SWINDON, MARLBOROUGH, AND ANDOVER RAILWAY COMPANY.

[1876 W. 5.]

Rules of Court, 1875, *Order* L., *r.* 1—*Motion to dismiss for want of Prosecution—Bankruptcy of Plaintiff—Abatement—Notice to Trustees.*

5 Ch D. 849

Where a Plaintiff had made default in delivering his statement of claim, and had since become bankrupt,

Notice of motion to dismiss for want of prosecution was ordered to be served on the trustees in bankruptcy, although under Rules of Court, 1875, Order L., rule 1, the action had not become abated by the bankruptcy.

Statement.

THE Plaintiff had been required to deliver a statement of claim, but had failed to do so within the proper time, and had since become bankrupt.

See S.C. 24 W.R. (1876) 250, 255, 296

Romer, for the Defendants, now moved that the action might be dismissed for want of prosecution, submitting that under Rules of Court, 1875, Order L., rule 1, the action had not become abated by bankruptcy, and that it was, therefore, unnecessary to make the trustees in bankruptcy parties, as would have been the case under the old practice.

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JESSEL, M.R.:— Judgment.

You must serve notice of motion on the trustees. I do not think it was the intention of the Legislature to dispense, in any case, with notice to trustees in bankruptcy of proceedings against the bankrupt.

Solicitor: *W. Moon.*

In re COLEMAN AND JARROM.

M. R. 1876 Nov. 18.

Will—Gift to "Children of A. who shall be living at my Death, or who shall have died in my lifetime leaving Issue living at my Death"—Presumption of Gift to Issue—Gift to Class capable of taking—Lapse—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78).

A testator devised five freehold houses to "all and every the children of my late brother *J. C.* who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares." By a codicil, after reciting that some of the children of his late brother *J. C.* had lately died without issue, the testator revoked his previous devise, and devised one of the houses to *A.*, and the remaining four in the same terms as the original devise.

Four children of *J. C.* were living at the testator's death, and one other child died in the testator's lifetime leaving children living at the testator's death:—

Held, that the four children who survived the testator took the whole property.

Where there is a gift by a testator to a class, the rule is that those members of the class who are at his death capable of taking, take the whole, the gift being construed as shewing an intention on the part of the testator that the class shall take so far as the law allows.

SAMUEL COLEMAN, by his will, dated the 14th of July, 1868, devised his five freehold houses in *Leicester* "unto and to the use of all and every the children of my late brother *Joseph Coleman* Statement.

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who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares as tenants in common in fee simple."

Statement.

By a codicil dated the 9th of May, 1872, after reciting that some of the children of *Joseph Coleman* had lately died without issue, the testator revoked his previous devise of the five houses and, instead thereof, devised one of them to his wife's grandson, and the remaining four "unto and to the use of all and every the children of my said late brother *Joseph Coleman* who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares as tenants in common in fee simple."

The testator died on the 31st of January, 1875.

His brother, *Joseph Coleman*, had several children, of whom four were living at the testator's death, and one, *Thomas Hunt Coleman*, died in the testator's lifetime leaving children living at the testator's death.

In June, 1876, the four surviving children entered into a contract for the sale of the four houses to *Joseph Jarrom*, who died before the completion of the purchase, having by his will devised all his real estate to trustees. In investigating the title to the property, *Jarrom's* trustees raised the objection that the vendors had not the whole of the property vested in them, but that the fifth share, which *Thomas Hunt Coleman* would have taken had he survived the testator, *Samuel Coleman*, was vested either in *Thomas Hunt Coleman's* issue, or in the testator's residuary devisee or heir-at-law.

As the purchasers insisted on their objection, the vendors took out a summons in Chambers under the *Vendor and Purchaser Act*, 1874, to obtain a declaration that the objection was not a good and valid objection, and that they had deduced a good title to the property. The question was argued by counsel in Chambers, but at the request of the parties judgment was delivered in Court.

Argument.

Cozens-Hardy, for the vendors:—

It is clear that the only persons included in the gift are children, and that the issue of a deceased child take nothing by implication. Had the devise been to the testator's own children, the

property would, no doubt, by virtue of the 33rd section of the *Wills Act* (1 Vict. c. 26), have gone to the children who survived him, and to the heir or devisee of any child who predeceased him. But the devisee who predeceased the testator, being a nephew, could not take. Lapse can only be excluded by clear words, and by a clear indication of the person to take in the place of the deceased legatee: *Browne* v. *Hope* (1), and those requirements are not satisfied in the present case. The general rule of law applicable to this case is, that where there is a gift to a class, those members of the class who survive the testator, and are capable of taking, take the whole: *Fell* v. *Biddolph* (2); *Dimond* v. *Bostock* (3).

Liebstein, for the purchasers:—

The language in this devise differs from that in the cases cited, and, in fact, in all the authorities on the same side. In those cases the gift is to a class by one designation, as "children" or "brothers;" but here the gift is really to two classes; first, children living at the testator's death, and secondly, children predeceasing the testator but leaving issue living at his death: so that it would be straining the authorities too far to say that the gift to one class having failed for invalidity, the other class should take the whole. The proper construction appears to be that one of the classes being incapable of taking, there is an intestacy as to the devise to that class. Moreover, the testator shews a manifest intention that children living at his death should not take the whole, for by his codicil he withdraws one of the houses from his previous devise, on account of some of *Joseph Coleman's* children having died without issue, and by a new devise provides for the possibility of other children dying leaving issue. I therefore submit that either the issue of the deceased nephew take one-fifth of the property by implication, or the one-fifth vests in his heir or devisee, or passes to the testator's heir-at-law or residuary devisee. In any view, the present vendors alone cannot make a title, or, at least, the title is too doubtful to be forced on the purchasers.

(1) Law Rep. 14 Eq. 343, 347. (2) Law Rep. 10 C. P. 701.
(3) Law Rep. 10 Ch. 358.

M. R. 1876 *In re* COLEMAN AND JARROM. Judgment.

JESSEL, M.R. :—

This summons, which was taken out under the *Vendor and Purchaser Act*, 1874, I heard argued before me in Chambers under the new power given to a vendor or purchaser of obtaining a judicial decision on a question of title by means of an application to a Judge in Chambers. The practice of having these questions argued in Chambers is not altogether free from inconvenience, and I am in the habit of directing an adjournment into Court in cases where I am able to do so, and where that course is satisfactory to the parties, but the general practice is to decide these cases in Chambers, though, as they frequently involve important questions of law, I think it would be more satisfactory if they could be heard in public. However, although the Act compels me to hear all these cases argued in Chambers, if in any particular case I am of opinion that the title is good, and the purchaser desires to strengthen his title, I am willing to give my decision in Court, and that is why I am now delivering judgment in Court in the present case—which is one involving a point of general interest. The real question depended upon a gift by will, in which the testator seemed to have taken a great deal of trouble to do that which the law did not allow him to do. He gave certain freehold houses to "the children of my late brother *Joseph Coleman* who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares." Four children of *Joseph Coleman* were living at the testator's death, and one other child died in the testator's lifetime leaving issue living at the death of the testator. Therefore, as regards that child, if this was a good gift, it was a gift to a dead child. Now it is plain from the codicil, in which the testator states that some of *Joseph Coleman's* children had died without issue, that he on that account withdraws part of the property from the devise previously made by his will. It would seem, therefore, that he did intend to provide somehow for a child who died leaving issue, but he did not know how to do it. It is clear that a gift to a person leaving issue, but dying in the testator's lifetime, not being a child or other issue of the testator, lapses; and the question I had to consider was whether I could presume or infer from this gift a gift to the issue of the child who died in the testator's lifetime. I

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think I cannot. It is a form of gift commonly used where the testator intends to provide for his own issue, but I do not see how I can presume a gift to the issue of a child dying in the testator's lifetime, because the law does not allow that child to be a member of the class comprised in a gift to "children." Therefore I cannot presume a gift to issue. Then the next question was, whether the remaining four children took the whole or whether there was a lapse of one share. No doubt, the general rule of construction is that, in a gift to a class, where the class consists of children or descendants, those members of the class take who are capable of taking at the death of the testator. Now, first of all, what is the true rule? The rule is generally stated thus, that those members of the class who survive the testator take, but I think the true rule is that those members of the class take who are at his death capable of taking. In many of the cases the Judges say this rule does not depend upon the intention of the testator. With great respect, it appears to me that that is not so. The rule of construction is to ascertain the intention of the testator as artificially expressed, remembering that the testator does not usually know the law, just as in the case of this testator. Now I think there is a convenient mode of interpreting this testator's intention, and it is this: the testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is that if all cannot take those who can shall do so. Both intentions co-exist, and are frequently exemplified. Take, for instance, the case of a testator who, knowing the law that a bad devise falls into the residue, devises real estate to a charity. His first intention is that the charity shall take, if it can; if not, then his secondary intention is that his residuary devisee shall take. So, if a testator gives a legacy to *A.*, his first intention is that *A.* shall take, if he can: if he cannot take, say, on account of his death in the testator's lifetime, then the secondary intention is that the residuary legatee shall take. In other words, he means that if one event does not happen, the other shall. In the same way, if a testator gives to a class, he intends that the class shall take so far as the law allows, and therefore if any member of that class dies in his lifetime the share which that member would

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have taken had he survived the testator goes over to the other members of the class who do survive: that is to say, the members of the class who are living at the death of the testator and are capable of taking, are the persons to take. That is the rule. Now as to the authorities.

The first I will mention is *Shaw* v. *M'Mahon* (1), which was a singular case. It arose upon the will of a former Master of the Rolls in *Ireland*, who gave a fund equally amongst his children living at his death. He subsequently, by codicil, revoked the gift to *William*, one of the children, and the question was, whether there was an intestacy as to *William's* share, or whether it went to the other children; and the then Lord Chancellor of *Ireland*, Sir *Edward Sugden*, decided that they took the share. In his judgment (2), he says: "It is now settled, and, in my opinion, upon very reasonable grounds, that where there is a gift to a class, and one dies in the testator's lifetime, his share will not lapse, but the whole will be divided amongst the survivors. If, therefore, I can discover in this instrument sufficient evidence of the testator's intention that the remaining children should take the share of the residue originally bequeathed to his second son, there is authority to give effect to that intention." And again, he says: "The effect of such (that is, a contrary) construction, as far as relates to the personal estate, would be, that *Beresford*, as one of the next of kin, would take a portion of it, and not only *Beresford*, but also *William*, the very son whom he intended to exclude. . . . This clearly was not his intention, and there is no rule of law which compels me to adopt this construction. On the contrary, the authorities are in favour of the opposite construction. The gift is to a class, and the time of the death of the testator is the period when the objects included in that class are to be ascertained, and at that time *William* is excluded by the codicil. I am clearly of opinion that I disturb no rule of law, and give effect to the plain intention of the testator, in deciding that *William* is excluded from any share of the residue, the whole of which must go to the other residuary legatees." In other words, *William* having been excluded by the codicil, the Lord Chancellor considered him to be in the same position as if he had been originally excluded by the will.

(1) 4 Dr. & W. 431. (2) 4 Dr. & W. 438, 440.

In *Fell* v. *Biddolph* (1), a case similar to the present, the rule was stated in the way it should be stated. There the testator devised lands to his niece and her husband for their respective lives, and then to be equally divided among their children. There were eight children living at the death of the testator, but two of them, *Thomas* and *Sarah*, had attested the will, and were consequently incapable of taking, and the question was whether there was an intestacy as to the shares of those two children, or whether there was a class gift and those shares went to the other children. The Court of Common Pleas held that the other children took, and not the heir-at-law. In the course of the judgment, which was delivered by Lord *Coleridge*, and was carefully considered, His Lordship refers to the case of *Young* v. *Davies* (2), before Vice-Chancellor *Kindersley*, where there was a gift to a class as joint tenants, and the Vice-Chancellor held that the forfeited share of one of the joint tenants survived to the others. He was influenced by the conveyancing law as to joint tenancy, under which a gift to *A.* and *B.*, on *A.*'s death vests the whole in *B.* The Vice-Chancellor there says (3): "With regard to the question upon the gift to the daughter surviving the tenant for life who was an attesting witness to the will, I am of opinion that, though the statute avoids the gift to her, and renders her incapable of taking, it does not sever the joint tenancy; it does not render the testator intestate as to the share intended for her; but the whole goes to her sisters, who alone were capable of taking." It seems, therefore, that the Vice-Chancellor decided the case upon the principle of the law as to joint tenancy; but the deduction which Lord *Coleridge* makes from these remarks is that the Vice-Chancellor regarded one incapable of taking at the testator's death as not one of the class at all. I do not think this deduction is altogether correct, for the Vice-Chancellor seems to have decided the case upon the question of severance of a joint tenancy, and nothing else. However, Lord *Coleridge* says (4): "It would fairly seem from this that the Vice-Chancellor regarded one incapable of taking at the time of the death of the testator as not one of the class the members of which were to be ascertained at this period. We certainly are of this opinion. By

(1) Law Rep. 10 C. P. 701.
(2) 2 Dr. & Sm. 167.
(3) 2 Dr. & Sm. 172.
(4) Law Rep. 10 C. P. 709.

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the operation of the statute the names of *Thomas* and *Sarah* (assuming the latter to be an attesting witness, as the Plaintiff contends) are struck out of the will: they are rendered incapable of taking, and therefore, in our judgment, are not to be reckoned in the class ascertained at the testator's death." I think that is the true rule, though I should not have deduced it myself from the Vice-Chancellor's judgment. Lord *Coleridge* then says (1): "This case, no doubt, shews that the class is to be ascertained at the death of the testator; but it is a strong case to shew that, in gifts to a class, the class as a whole is to be regarded, even though such rule conflicts with the express words of the testator; some of those included in the bequest there being incapable of taking." That is to say, the rule may be in apparent conflict with the express words of the gift, as in the case of a devise to a charity, but you make the rule consistent with the testator's language by saying his intention is that each member of the class shall take, if he can.

Dimond v. *Bostock* (2) was also a curious case. There a testatrix gave personal estate in trust for all the nephews and nieces of her late husband who were living at the time of his decease, with two exceptions, as tenants in common. That is, there was a gift to a class living at the time of her late husband's decease, not her decease, and it was suggested that two of the nephews who died in the lifetime of the testatrix were members of a class ascertained at the date of the will, and that their shares therefore lapsed; but it was held that the fund was divisible among those who survived the testatrix, the gift being to a class, and that the members of that class to take were to be ascertained at the death of the testatrix. The only effect of the gift to those nephews and nieces who were living at the death of the husband was to shew that the class could not afterwards be increased. The Lord Justice *James* there says (3): "The rule of the Courts with regard to lapse very often operates against the intention of a testator, and the Court has made this modification of the rule, that where there is a gift to a class, the rule of lapse does not apply. In that case the fund is to be divided among the members of the class living at the period of distribution, unless the words describing the class are used for mere

(1) Law Rep. 10 C. P. 710. (2) Law Rep. 10 Ch. 358.
(3) Law Rep. 10 Ch. 360.

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brevity, instead of designating the persons by name." And the Lord Justice *Mellish* concurs. I feel satisfied that the Lord Justice *James* did not mean to say that the rule as he had stated it was the whole rule, but that what he meant was that the fund was divisible among those members of the class who were capable of taking. I think the true rule is that those members of the class who are at the testator's death capable of taking take, and that those who become incapable of taking—whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law—do not take. That being, in my opinion, the true rule, I decide this case in favour of the vendors, and therefore there will be a declaration that the purchasers' objection is not a good and valid objection, and that the vendors have a good title to the property.

Solicitors for Vendors: *Field, Roscoe, & Co.*, agents for *Stone, Billson, & Stone, Leicester.*

Solicitor for Purchasers: *T. A. Tibbitts*, agent for *J. Harvey Leicester.*

NAGLE-GILLMAN *v.* CHRISTOPHER.

M. R.
1876
Nov. 14, 28.

[1875 N. 47.]

Practice—Hearing in Private.

Semble, the High Court of Justice has no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of an action, or in those cases where the practice of the old Ecclesiastical Courts as to hearing *in camerâ* is continued.

Statement.

THIS was an action brought by a husband against the trustees of his marriage settlement to compel them to raise a sum of £2000, part of the settled property, which the Plaintiff and his wife had purported to appoint by deed to the Plaintiff absolutely, in exercise of a power in the settlement enabling them jointly to appoint that sum to any person.

Two of the trustees had declined to raise the said sum, except under the direction of the Court, on the ground that the wife was,

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as they alleged, acting under the Plaintiff's coercion when she executed the deed; and they relied on a series of letters written by the wife as shewing a course of treatment by the Plaintiff which justified their refusal.

Waller, Q.C., and *J. D. Davenport*, for the Plaintiff.

Chitty, Q.C., and *Bevir*, for the two refusing trustees.

Reginald Hughes, for the wife and the third trustee.

In the course of the trial the Plaintiff's counsel proposed to examine the wife, to shew that she was a free agent when she signed the deed, and the counsel for the trustees proposed to cross-examine her as to the truth of her letters.

It was proposed, on account of the painful nature of the case, that the wife's examination should be taken in private.

Chitty, Q.C., referred to *C.* v. *C.* (1), *A.* v. *A.* (2), and *Andrew* v. *Raeburn* (3).

Judgment.

JESSEL, M.R., considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action, as was suggested in *Andrew* v. *Raeburn* (3), or those cases where the practice of the old Ecclesiastical Courts in this respect is continued.

Solicitors: *Campbell, Reeves, & Hooper; D. S. Christopher & Son.*

(1) Law Rep. 1 P. & M. 640. (2) Law Rep. 3 P. & M. 230.
(3) Law Rep. 9 Ch. 522.

LEE *v.* LEE.

M. R.
1876
Dec. 4.

[1875 L. 24a.]

Husband and Wife—Ante-nuptial Agreement by Husband to settle Wife's Real Estate—Reversionary Interest—Liability of Wife.

By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that "he would settle" his wife's reversionary share of the said real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his said daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—

Held, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance ordered accordingly.

Statement.

BY the marriage settlement, dated the 2nd of December, 1835, of *Thomas George Shaw* and *Mary* his wife, a freehold house in *Lawrence Lane, London*, was settled to the use of the said *Mary Shaw* for life, with remainder to the use of the said *T. G. Shaw* for life, with remainder to the use of the children of the marriage as the survivor of the said *T. G. Shaw* and *Mary Shaw* should by will appoint, and subject to any such appointment, to the use of all the children of the marriage as tenants in common, and their respective heirs.

Mr. and Mrs. *Shaw* had six children, one of whom, *Marion Shaw*, married *Arthur Lee*.

By an agreement not under seal, dated the 23rd of March, 1869 (being the day previous to such marriage), and made between the said *Arthur Lee* of the first part, the said *Marion Shaw* of the second part, and the said *T. G. Shaw* and *Mary Shaw* of the third part, the said *T. G. Shaw* and *Mary Shaw*, "in consideration of" the intended marriage, and "in exercise of the power given to them or the survivor of them by their marriage settlement," agreed with the said *Arthur Lee* that they or the survivor of them

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would appoint unto the said *Marion Shaw* at least one-sixth part or share of the property comprised in such settlement; but if at the date of such appointment there should be fewer than six children of the said *T. G. Shaw* and *Mary Shaw* then living, then that they the said *T. G. Shaw* and *Mary Shaw* or the survivor of them would appoint one equal share at least of the whole of such property, the said property being considered to be for the purposes of the agreement divided equally among such children as should be living at the date of such appointment. And the agreement then proceeded as follows: "And for the considerations aforesaid, he the said *Arthur Lee* hereby agrees for himself, his heirs, executors and administrators, that he will settle such share as the said *Marion Shaw* (or *Marion Lee* his wife) may take in the property so comprised in her father and mother's (the said *Thomas George Shaw* and *Mary* his wife) said settlement, either by appointment or in default of appointment so that the income thereof may be paid to the said *Marion Shaw* for her life for her separate use, without power of anticipation, with remainder to the said *Arthur Lee* for his life, with ultimate remainder to the children of the said *Arthur Lee* and *Marion Shaw*, as the said *Arthur Lee* and *Marion Shaw* shall appoint by deed, or the survivor of them, in default of joint appointment, shall by deed or will appoint, and in default of such appointment to the children of the said *Arthur Lee* and *Marion Shaw* equally. Such settlement shall contain the usual and necessary clauses." The agreement was duly signed by all the parties thereto, including the said *Marion Shaw*.

One of Mr. and Mrs. *Shaw's* children died in July, 1872, intestate and without issue, leaving his father his heir-at-law. Mrs. *Shaw* died in November, 1874.

By an indenture dated the 8th of December, 1874, and made between the said *T. G. Shaw* of the first part, the said *Arthur Lee* and *Marion* his wife, and the four other surviving children of Mr. and Mrs. *Shaw* of the second part, and the trustees of the settlement of the 2nd of December, 1835, of the third part, the said *T. G. Shaw* released and extinguished the power of appointment vested in him by his said settlement, and granted the hereditaments comprised in that settlement to the use of himself for life, in confirmation of his former life estate, with remainder, as to the

share of the premises which belonged to him as heir-at-law of his deceased child, to the use of his five surviving children, including the said *Marion Lee*, as tenants in common in fee. And it was thereby declared that as regarded the share or shares and interests devolving by virtue of the settlement of the 2nd of December, 1835, and the now stating indenture upon the said *Marion Lee*, her heirs and assigns, the release and grant thereby made should be deemed a performance and satisfaction of the agreement of the 23rd of March, 1869, entered into by the said *T. G. Shaw* and *Mary Shaw*.

Statement.

Marion Lee died on the 5th of July, 1875, leaving two infant children, the only issue of her marriage, and without having executed or joined in executing any settlement in pursuance of the agreement of the 23rd of March, 1869, or having concurred with her husband in making any appointment under the power thereby given to them. At the time of her death she was entitled under the settlement of the 2nd of December, 1835, and the deed of the 8th of December, 1874 (assuming the latter deed to have operated as an effectual release of her father's power of appointment), to one equal fifth share of the hereditaments comprised in the settlement in reversion expectant upon the death of her father, who was still living, and the question was whether this share was bound by the agreement of the 23rd of March, 1869.

The question was raised by an action in which Mrs. *Lee's* husband and youngest child were Plaintiffs, and her eldest child, who was her heir-at-law, was Defendant. The claim was for specific performance of the agreement, and for a settlement accordingly; also for a declaration that the Defendant was a trustee of the share vested in him as his mother's heir-at-law.

W. H. Townsend, for the Plaintiffs, was stopped by the Court.

Argument.

J. Armstrong, for the Defendant:—

I submit that Mrs. *Lee's* share is not bound by the agreement, and that no settlement is now possible, Mrs. *Lee* being dead, and the property being real estate. The agreement is, in terms, by the husband alone, that "he will settle," not, generally, that "the share shall be settled"—a very material distinction, as was pointed out in *Campbell* v. *Bainbridge* (1), where the wife's personal estate

(1) Law Rep. 6 Eq. 269, 273.

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—not real estate—was held to be bound because, in addition to the husband's covenant, there were the words "it is hereby declared and agreed." In *Young* v. *Smith* (1) those words were omitted, and the covenant, being by the husband alone, was held not to be binding on the wife. But even where the husband's covenant is prefaced by those words, it does not necessarily follow that the wife is bound; they merely operate to shew that what is comprised in the clause is what all the parties to the instrument intend and agree shall be done, but the party who is to *do* the particular thing is the only person who is bound to perform the agreement: *Ramsden* v. *Smith* (2), where Vice-Chancellor *Kindersley's* observations are precisely applicable to this case. He says: "Take it as the covenant of the husband, to which all parties agree. The covenant of the husband is to do what? To settle his wife's separate property. The husband has no more power to settle the wife's separate property than I have or anybody else has." It may possibly have been the intention of the wife as well as of the husband that the property should be settled, but the Court cannot presume the intention. As Vice-Chancellor *Kindersley* says, you cannot alter the terms of the instrument, but must take it as it stands. Moreover, the agreement is an improvident one as regards the wife, for it settles all her property on her first marriage. It does not appear that she had any proper advice.

[JESSEL, M.R.:—Her father and mother were both parties to, and signed, the agreement.]

It is clear that the deed of the 8th of December, 1874, operated as an effectual release of the father's power of appointment: *Isaac* v. *Hughes* (3).

[JESSEL, M.R.:—That is clearly so.]

Judgment.

JESSEL, M.R.:—

The question is whether these articles of settlement are binding on the wife's heir-at-law. The instrument is not well drawn, but looking at its general scope and object, they are these: Mr. and Mrs. *Shaw* have a power of appointment over certain real estate in favour of their children. At the date of the agreement in ques-

(1) Law Rep. 1 Eq. 180. (2) 2 Drew. 298, 309. (3) Law Rep. 9 Eq. 191.

tion they have six children, one of whom, a daughter, is about to be married. They agree that they will appoint to this daughter at least one-sixth of the property; that is, she is to have one-sixth obviously for the purpose of the proposed settlement. Their agreement so to exercise their power is expressed to be in consideration of her intended marriage, and their object in entering into the agreement is to enable the husband to make a settlement. Then the husband proceeds to settle, or agree to settle, what does not belong to him, as indeed appears by the instrument itself. Unquestionably, the property was not his to settle; it was his wife's, and he could not settle it himself, because during the lives of the wife's father and mother he could have no interest whatever, therefore his covenant or agreement to settle was a covenant or agreement to settle not his own estate but somebody else's. But the wife was an assenting party to this agreement. It was, therefore, simply an agreement by *A.*, with *B.'s* assent, to settle *B.'s* estate, and in such a case it is clear that *B.* is bound. So that even if it is treated as a covenant by the husband alone, yet it is for valuable consideration and with the assent of the wife, and she is therefore bound. That is rudimentary law. In the two cases which were referred to, *Young* v. *Smith* (1) and *Ramsden* v. *Smith* (2), the covenant was to settle the after-acquired property of the wife, and the real question was, what property was included in the covenant. The property which was to be the subject of the covenant was described in general terms, and the question in both cases was whether the covenant was intended to apply to a legacy bequeathed to the wife subsequently to the marriage. But those cases have no application to the case now before me, where the property agreed to be settled is specifically described, and there is, therefore, no doubt whatever as to what property is included in this covenant. The agreement by the husband that he would settle this particular property was clearly binding on the wife, she having assented to it by being a party to the agreement, and is equally so on her heir-at-law, and therefore there will be judgment for the Plaintiffs.

Solicitors: *Hurford & Taylor.*

(1) Law Rep. 1 Eq. 180. (2) 2 Drew. 298.

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Dec. 8.

In re WORTLEY.
CULLEY *v.* WORTLEY.

[1876 W. 136.]

In re WORTLEY.
HARVARD *v.* STOREY.

[1876 W. 138.]

Practice—New Defendant to Consolidated Action—Rules of Court, 1875, *Order* XVI., *rr.* 14, 15.

Where two actions had been ordered to be consolidated, on an application by the Plaintiff to add new Defendants to the consolidated action before trial, and to make *W.*, one of the present Defendants, a party to the action in a representative character, the Court, under Rules of Court, 1875, Order XVI., rules 14, 15, ordered that the proposed new Defendants should be added without service of any writ, and that *W.* be made a Defendant in his representative character without any further indorsement on any writ,—such order to take effect unless the new Defendants and *W.* should respectively shew cause to the contrary within eight days after service thereof.

Statement.

THESE were actions for the administration of the estate of *John Wortley*, a deceased testator.

On the 25th of April, 1876, on motion for the appointment of a receiver in each action, an order had been made that the two actions should be consolidated, and be thenceforth carried on as one action, and as if the Plaintiff in the second action were the sole Plaintiff, and the Defendants in both actions were Defendants in such one action.

At the date of the said order the estate was not represented in consequence of the death of Mrs. *Wortley*, the sole executrix of the testator, who had died intestate. Letters of administration of his estate *de bonis non* with the will annexed had since been granted to Mrs. *Jacobs*, the testator's daughter, and letters of administration to the estate of Mrs. *Wortley* had also been since granted to *H. H. Wortley*, who was a Defendant in both actions in his character of beneficiary.

It was now proposed to add Mrs. *Jacobs* and her husband as Defendants to the consolidated action, and to make the said *H. H.*

Wortley a Defendant thereto in his new character as representative of Mrs. *Wortley*, the deceased executrix of the testator.

Cozens-Hardy, for the Plaintiff, now applied to the Court for this purpose, and asked for directions how to proceed. He referred to Rules of Court, 1875, Order XVI., rules 14, 15, and Order L., rule 4. He submitted that the directions in these rules were not applicable to the case of a consolidated action.

JESSEL, M.R., said that the rules did not meet the case of consolidated actions. His Lordship directed Mr. and Mrs. *Jacobs* to be added as Defendants to the consolidated action without service of any writ, and the Defendant *H. H. Wortley* to be made a Defendant thereto in his representative character, as the legal personal representative of Mrs. *Wortley*, without any further indorsement on any writ; the order to be conditional and to take effect unless Mr. and Mrs. *Jacobs* and *H. H. Wortley* should shew cause to the contrary within eight days after service of the present order.

Solicitors: *Sharpe, Parkers, & Co.*

For order see 2 Seton 1521. No 6. Reg Lib 1876 B 2007.

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1876
Nov. 17, 18.

In re MERCERON'S TRUSTS.
DAVIES *v.* MERCERON.

[1876 B. 131.]

Will—Construction—"Die without Issue"—Reference to Children.

A testator gave a fund of £66,666 13*s.* 4*d.* consols to trustees, upon trust to pay £1000 a year to each of his two daughters for their lives, and after the death of each daughter he gave the sum of £33,333 6*s.* 8*d.* consols, which he described as the share of each daughter, unto and among all and every such child or children she might happen to leave at her decease, to be equally divided between them when and as they should respectively attain the age of twenty-one years, and if but one child, then to such only child; and in case either of his daughters should die without issue, he directed that the £33,333 6*s.* 8*d.* consols, being the share of her so dying, should be transferred by his trustee to such person or persons, and in such manner as she by her will and testament in writing duly executed might direct and appoint. There was a general residuary gift.

One of the daughters executed the power and died, having had one child, who died in her lifetime, leaving children who survived their grandmother.

Held, that the words "die without issue" meant such issue as were previously mentioned, and that the power was validly exercised.

Statement.

JOSEPH MERCERON, by his will, dated the 10th of May, 1838, gave to certain trustees a sum of £66,666 13*s.* 4*d.* £3 per Cents, upon trusts expressed in the following words: "Upon trust to receive the interest and dividends, and pay the same in manner following, that is to say:—£1000 per annum, being the interest of £33,333 6*s.* 8*d.*, to my daughter *Ann Brutton*, and £1000 per annum, being the interest of the other £33,333 6*s.* 8*d.*, to my daughter *Elizabeth Bruce*, for and during the term of their natural lives, to and for their own sole and separate use and benefit notwithstanding coverture. And from and immediately after the decease of either of my said daughters, I give and bequeath the said £33,333 6*s.* 8*d.* £3 per Cent. Consols, being such daughter's share, unto and among all and every such child or children she may happen to leave at her decease, to be equally divided between them when and as they shall respectively attain the age of twenty-one years, and if but one child, then to such only child; and in case either of my said daughters shall die without issue,

then I direct that the said £33,333 6*s.* 8*d.* £3 per Cent. Consols, being the share of her so dying, shall be transferred by my trustees to such person or persons, and in such manner as she by her will and testament in writing duly executed may direct and appoint." The will then contained a residuary gift in favour of the testator's son *Henry Merceron.*

The testator died on the 14th of July, 1839, and £66,666 13*s.* 4*d.* was afterwards transferred into the names of the trustees.

Mrs. *Ann Brutton* had only one child, *Ann Eliza,* who became the wife of the Rev. *Septimus Russell Davies,* and died in the month of August, 1869, leaving five children, who all attained twenty-one, and were all now living.

Mrs. *Ann Brutton* died on the 20th of January, 1876, having by her will, which was dated the 19th of March, 1869, recited the will of *Joseph Merceron* and in express exercise of the before-mentioned power of appointment, and of every other power enabling her thereto, directed that the trustees or trustee for the time being of her father's will should immediately after her decease stand possessed of and interested in the sum of £33,333 6*s.* 8*d.* Consols, in trust forthwith to pay and transfer the said trust premises to her executors and trustee thereinafter named; and she directed that the same trust funds should be held upon trust to pay such of her debts as her residuary estate should be insufficient to satisfy, and subject thereto, upon certain trusts which were substantially in favour of her grandchildren, the children of Mrs. *Brutton.*

The present suit was instituted for the administration of the estate of Mrs. *Brutton,* and the trustees of *Joseph Merceron's* will paid the £33,333 6*s.* 8*d.* into Court under the *Trustee Relief Act,* and in the suit.

The question to be determined was, whether the words in the clause referring to the death of the testator's daughters "without issue" were to be read as if they had been "without such issue," and thus to relate to the children of the daughter, or they must be construed strictly, in which case the event had not arisen for which the gift over could take effect, and the fund would belong to the residuary legatee.

The Plaintiff in the suit, who was one of the children of Mrs.

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Davies and a beneficiary under Mrs. *Brutton's* will, now petitioned for payment of the fund out of Court.

Glasse, Q.C., and *C. H. Turner*, for the Plaintiff:—

This is one of the class of cases of which *Martin* v. *Holgate* (1) is now the leading authority, in which it has been held that the word "issue" must be read as "children." *Bryden* v. *Willett* (2) and *In re Heath's Settlement* (3) are also instances where a similar construction has been sustained, and similarly as in *Treharne* v. *Layton* (4) and *Heasman* v. *Pearse* (5), the Court also construes "leaving children" as "having had" them.

J. Pearson, Q.C., and *Owen*, for another of the daughters, argued for the same construction.

Higgins, Q.C., and *Prior*, for the father of the grandchildren.

Locock Webb, Q.C., and *Rodwell*, for an appointee of part of the fund.

Borthwick, for another person similarly interested.

H. F. Bristowe, Q.C., and *T. A. Watson*, for the residuary legatee:—

This case is really governed by *Pride* v. *Fooks* (6), and *Bryden* v. *Willett* is not in point. The distinction between the classes of cases is shewn by *Bythesea* v. *Bythesea* (7). The rule is that where there is a gift over on a specified event, the event in which it is to take effect must be construed strictly. Other cases supporting this rule are *Butler* v. *Gray* (8); *Savage* v. *Tyers* (9); *Kellett* v. *Kellett* (10); *In re Heath's Settlement*; *Andree* v. *Ward* (11); *Westwood* v. *Southey* (12).

Glasse, in reply:—

Pride v. *Fooks* turned on the use of the word "any," but the

(1) Law Rep. 1 H. L. 175.
(2) Ibid. 7 Eq. 472.
(3) 23 Beav. 193.
(4) Law Rep. 10 Q. B. 459.
(5) Ibid. 7 Ch. 275.
(6) 3 De G. & J. 252. 5 Jun 58. 159
(7) 23 L. J. (Ch.) 1004. 17 Jun 64
(8) Law Rep. 5 Ch. 26.
(9) Ibid. 7 Ch. 356.
(10) Ibid. 3 H. L. 160.
(11) 1 Russ. 260.
(12) 2 Sim. (N.S.) 192.

Court is at liberty to put a rational construction on words of a will so as not to defeat the manifest intention of the testator: *Malcolm* v. *Taylor* (1); *Candy* v. *Campbell* (2); *Ellicombe* v. *Gompertz* (3).

MALINS, V.C., after referring to the words of the will, and the facts of the case, continued:—

On one side it is said that the words "in case either of my said daughters shall die without issue" mean if she should die without issue of any description whatever, and that event has not happened, because the daughter Mrs. *Brutton* left five grandchildren, and consequently did not die without issue. If, therefore, the very literal words of the will are adhered to, it is perfectly plain, that, so far as this part of the case goes, the daughter could not exercise the power of appointment; and if I adhere to that construction, the manifest intention of this testator's will would be defeated. I quite agree that when effect is given to the testator's intention, his meaning must be clearly and satisfactorily collected from the words he has used. Now, he gives his general residuary estate and his real estate to his son, and he devoted £33,333 6*s.* 8*d.* Consols to each of his two daughters, who were consequently the primary objects of his bounty, for life, and then to their children, but failing the daughter's children, the children of their children do not take. It is to my mind perfectly clear that, inasmuch as the children of the daughters, who are the primary objects of this disposition, cannot take, the next object of the testator's bounty is the daughter herself, who if she had no children or only children who could not take, is to have the absolute dominion over the fund. But in no event was the residuary legatee to take unless on failure of a disposition by the daughter. When, therefore, the testator directs that if his daughter dies without issue she is to dispose of the fund as she thinks fit, he cannot mean dying without issue generally. The meaning is, to my mind, perfectly plain, that if she should die it should go to such issue, that is, children attaining twenty-one. Suppose that the daughter died leaving a child of the age of twenty, and if that child had died

(1) 2 Russ. & My. 416. (2) 2 Cl. & F. 421.
(3) 3 My. & Cr. 127.

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under twenty-one she would not have died without issue, because she would have left a child. Dying without issue does not mean issue at the period of her death, but remoter issue, and, as has been remarked in many cases, the gift is to remote issue; but that was not the intention of the testator. In the case I have put of the daughter dying leaving a child of the age of twenty years, she does not die without issue, because she left a daughter, but if that daughter dies under twenty-one, according to the literal construction of these words as contended for by Mr. *Bristowe* and Mr. *Watson*, the gift must have failed because she did not die without issue, and the issue intended to take could not take because they did not attain twenty-one.

Therefore I am of opinion that this case falls within that numerous class in which the Court has put a rational interpretation upon the wills of testators, by holding that where there is a gift to one for life, with remainder to a class of children on attaining twenty-one, or on marriage, death without issue means, not a general failure of issue, but a failure of the particular class of issue who were the objects of the gift, and who were to take under the preceding limitation.

Now, in favour of this construction many cases have been cited. In *Bythesea* v. *Bythesea* (1) the gift over was to take effect upon the very event to which I have referred. *Malcolm* v. *Taylor* (2), which has been referred to, is a decision of Lord *Brougham's*, affirmed by the House of Lords, and is very frequently relied upon as an authority. It appears to me to lay down the law in a rational and satisfactory manner, and to be entirely applicable to this case. The rule laid down there was, that where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one being a son, or at twenty-one or marriage being a daughter, and there is a gift over in the event of the tenant for life dying without issue—it is to be intended as dying without such issue as would take by force of the prior limitation. That makes a rational construction. Supposing that in this case the gift over in default of issue of Mrs. *Brutton* had been in favour of the other

(1) 23 L. J. (Ch.) 1004. 17 Jur. 645 (2) 2 Russ. & My. 416.

daughter and her children, the second gift would take effect, simply because the first failed. Now *Malcolm* v. *Taylor* (1) represents a general class of cases which are rational, and carry into effect the intention of the testator by merely postponing the second gift for the sake of the first. I am clearly of opinion that by issue the testator intended this class of issue, namely, those children who should survive the mother.

The case mainly relied upon against this construction is the decision of Lords Justices *Knight Bruce* and *Turner* in *Pride* v. *Fooks* (2). The case is a very peculiar one, and, with all respect for those learned and distinguished Judges, I cannot help thinking that even in that case a more liberal interpretation might have been put upon the will of the testator; but it is evident that the decision proceeded upon the very emphatic language contained in that particular will. Mr. *Glasse* has drawn my attention to a passage where Lord Justice *Turner* says, with perfect accuracy, that you cannot in these cases lay down any general rule; but the particular language of every particular will must be looked at, and looking at the language of the will in *Pride* v. *Fooks*, Lord Justice *Turner* and Lord Justice *Knight Bruce* came to the conclusion that the gifts over did not take effect. [His Lordship then read the marginal note in that case, and continued:—]

I think that if in that case the words had been like the present, and "dying without issue" had been the event contemplated, the construction would have been otherwise, and the gift over would have taken effect. I am of opinion, therefore, that *Pride* v. *Fooks* does not stand in the way of the conclusion at which I arrive.

There are no other cases of any importance; many others have been cited, but they have no application to this case; and therefore, taking the provisions of the will as constituting a gift to the trustees for the benefit of the daughter for life, with a contingent gift in remainder to her children, which in the event failed, and a gift over if she died without issue, I read that as meaning dying without such issue.

But there is another point in the case, which, though I do not intend to rest my decision upon it, I think is also not in favour of the residuary legatee. Looking at the whole frame of this

(1) 2 Russ. & My. 416. (2) 3 De G. & J. 252.

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will, it is quite clear that the testator dedicated or devoted the £66,666 13*s.* 4*d.* Consols for the benefit of his daughters, and that he never intended in any event whatever that the son should have any interest in these two sums. The rule which has been laid down in *Mayer* v. *Townsend* (1) and *Whittell* v. *Dudin* (2), and has been followed by the House of Lords, and may be considered as settled, may be stated thus: Whenever a will gives property to a person absolutely, and then proceeds to dispose of that property for the benefit of the donee for life and afterwards for children of the donee, and it turns out that there are no children to take, the cutting down fails, and the original gift remains; and as it was absolute, so it remains absolute. Therefore, this fund being devoted absolutely to Mrs. *Brutton*, by being treated as her share, and then being given to her for life and afterwards to her children, and the particular class being unable to take, the property would remain unrestricted in Mrs. *Brutton*. Though I think this point far from clear, and if I had not been in favour of the appointees of Mrs. *Brutton* on the other ground, it would have required much more consideration, the inclination of my opinion is on that point also in favour of the appointees under Mrs. *Brutton's* will, because it is her share, and once being devoted or given to her, if the contingent gift fails the contingency alone is cut down, and the original gift remains in force. I find, also, that Mrs. *Brutton* by her will, referring to her power of appointment which she had over this property, makes a specific gift of it, and does so by virtue of the power under her father's will, and all other powers and authorities enabling her in any way to do so. If, therefore, in the events which have happened, she had not even a testamentary power under her father's will, she had, under this construction, the ownership, and, by virtue of that ownership, could dispose of it as she pleased as owner, and the result would be the same.

Therefore, upon all these grounds, I am clearly of opinion that the Petitioner, who is one of the appointees under the will of Mrs. *Brutton*, is entitled to the property.

Solicitors: *Fisher & Fisher; Robert Vos; Lewis & Indermaur.*

(1) 3 Beav. 443. (2) 2 Jac. & W. 279.

BRIGHT *v.* TYNDALL.

V.-C. M.

1876

Nov. 28.

[1875 B. 101.]

*Special Case—Discretion of the Court—Contingent Event—Parties not in esse—Creation of Fictitious Interest—*13 *&* 14 *Vict. c.* 35, *s.* 14.

Upon a special case to obtain a decision whether persons not *in esse* would be entitled, under certain circumstances which might never arise, to a share in property, the Court declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question.

Where the interests of the parties to a special case are not of such a nature as to give the Court jurisdiction to decide the questions, the Court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision.

Statement

THIS was a special case for the purpose of obtaining the opinion of the Court upon the construction of the will of *Thomas O. Tyndall,* dated the 27th of November, 1865. The testator devised and bequeathed to trustees all his real and personal estate to be held in trust for such of his six daughters (naming them), and such other his child or children, if any, living at the time of his decease, as being a son or sons should attain the age or respective ages of twenty-one years, or as being a daughter or daughters should attain that age or marry under such age with the consent in writing of her or their guardians or guardian respectively, and their, his, or her respective heirs, executors, and administrators as tenants in common. And the testator declared that the share or respective shares of each of his daughters respectively who should attain the age of twenty-one years or marry under that age with the consent aforesaid, should be held by the trustees or trustee for the time being of his will upon trust to pay and apply the rents, issues, and profits, dividends, interest, and income thereof respectively unto such daughter respectively during her life for her sole and separate use and benefit; and as to the share or respective shares of each of the testator's daughters respectively after her decease, upon trust to hold the same and the rents, issues, and profits, dividends, interest, and income thereof respectively upon trust for the child or such of the children of his said daughter

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respectively as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should marry under that age with the consent in writing of their or her guardian or guardians, and their, his, or her respective heirs, executors, or administrators as tenants in common. And the will contained a proviso that in case either of his daughters should die without leaving any issue who should attain a vested interest under the trusts aforesaid, then the shares and accruing shares of such daughters should go to the surviving daughters upon similar trusts.

The testator died on the 14th of September, 1869, leaving six daughters and no other issue, all of whom had attained the age of twenty-one years. One of the daughters had married and had issue one child only, a daughter, born in December, 1873, and another had married and had issue one child, a son, born in November, 1875.

By an indenture dated the 31st of December, 1874, *Mary Caroline Tyndall*, the eldest unmarried daughter of the testator, granted and assigned to the Plaintiff, *George Bright*, all her contingent life estate, share, and interest in the shares, as well original as accruing, of each of her said five sisters respectively under the before-mentioned will of and in the said testator's real and residuary personal estate, and the rents, issues, and profits, dividends, interest, and income thereof respectively, to arise upon the happening of the particular event of such sister dying in the lifetime of the said *Mary Caroline Tyndall*, without having or having had issue any child or children who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should marry under that age with the consent in writing of their or her guardians or guardian, but having or having had issue a daughter or daughters who or some or one of whom should attain the age of twenty-one years without having been married, to hold the same unto the said *George Bright*, his executors, administrators, and assigns absolutely.

Under these circumstances, the Plaintiff was advised and submitted that, under and by virtue of the indenture of the 31st of December, 1874, he had acquired such an interest in the real and residuary personal estate of the testator as entitled him to prefer

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a petition to the Court for the appointment of new trustees of the testator's will, or to file a bill in this Court for the purpose of having the residuary estate of the testator administered and secured for his benefit, and he claimed to be entitled to present such a petition or to file such bill accordingly; but it was alleged by or on behalf of the Defendants, that the Plaintiff had no such interest vested in him, the fact being, as they insisted, that by virtue of the will, according to the true construction thereof, every daughter of any of the Defendants, the six children of the testator who should attain the age of twenty-one years without having been married, would thereupon attain a vested interest under the trusts of the will, and that consequently no estate or interest whatever, contingent or otherwise, in the testator's residuary real and personal estate passed to the Plaintiff under the before-mentioned indenture.

The questions submitted were, whether *George Bright* had, under the circumstances before appearing, such an estate or interest in the real and residuary personal estate comprised in the will as entitled him to present a petition for the appointment of new trustees thereof, or to file a bill for the purpose of having the residuary estate of the testator administered and secured for his benefit. And further, by whom and out of what funds the costs of this case ought to be paid.

Argument.

Glasse, Q.C., and *Woodroffe*, for the Plaintiff:—

The question raised by this special case under the will of *Thomas Tyndall* is one that ought to be decided at once, in order that the parties may know what interest they take in the property in certain events which may happen. If the daughters of the testator should have daughters, it is most desirable that they should know whether they take a vested interest at twenty-one, whether they marry before or after that age, or whether they take no interest at all in case of their not marrying before twenty-one. The Plaintiff, to whom one of the daughters has assigned all her contingent interest in her sisters' shares, has a right to call upon the Court to decide what interest he has acquired. This case is governed by *Bell* v. *Cade* (1), where the Court allowed the special

(1) 2 J. & H. 122.

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case to be amended in order that the Court might be enabled to give a decision upon it, and to fix the interests of the parties; so in *Forsbrook* v. *Forsbrook* (1) the Court suggested amendments to the special case to give it jurisdiction to decide the rights.

In those cases it was for the benefit of the parties, as it is here, that they should know the extent of their interest under the will.

J. Pearson, Q.C., and *Chapman Barber*, for the infant son of the married daughter:—

We submit that the Court has no jurisdiction to decide this question at present. The Plaintiff is *George Bright*, in whose favour a deed has been made professing to assign to him, not any vested interest which the daughter now has, but a reversionary interest which may arise upon a contingency, according to one construction of the will, but not according to the other construction; that is such a remote and reversionary interest that the Court will not decide the question. It would be a most unwise thing to provoke a decision in the present state of the family, for this reason, that if the Court should decide that the granddaughters have no interest in case they attain twenty-one without marrying, then when any daughters have sons and daughters who attain twenty-one, the sons will have been told by the Court that they are entitled to the whole property, and the sisters are not entitled unless they marry previously to attaining twenty-one. This would deprive the sisters of all chance of an equitable division being made between the sons and daughters, but if it remained in doubt whether the daughters were entitled, there would be a better prospect of some arrangement being come to.

In the case of *Greenwood* v. *Sutherland* (2) the question which arose under the will was what children, grandchildren, or more remote issue of the sons and daughters of *Mary Greenwood* were comprehended in the word "issue," and what interests they took, and at what ages or times such interests were vested. There the Vice-Chancellor made declarations with regard to the interests of the legatees before the Court, but refused to make any declaration with regard to the issue of the sons and daughters. It was just as

(1) Law Rep. 3 Ch. 93. (2) 10 Hare, App. xii.

important for them to know what interests they took, as for the daughters in this case. In *Garlick* v. *Lawson* (1) the Vice-Chancellor considered that the question raised in that special case was not one that was necessary for the administration of the estate or to the relief to which the Plaintiff was entitled, and refused to make a decree. In *Bell* v. *Cade* (2) all the parties were before the Court who were entitled to contest the question there raised, and there was no reason why it should not be decided, consequently the same Vice-Chancellor ordered the special case to be amended at the request of the parties, in order to decide the question of remoteness, and the Plaintiff there obtained a decision that, subject to his mother's life interest, he was entitled to the fund. In this case the parties who may have an interest, that is, the unborn children of six daughters, are not before the Court, and you are asked to make a decree to bind all the granddaughters and grandsons that may come into *esse*.

Forsbrook v. *Forsbrook* (3) was a case in which it was most desirable that a decision should be arrived at, because there a person was in possession of an estate; if he was a tenant for life only, he could not commit waste, but if he was seised in fee simple, he could do what he liked. There leave was given to amend the case, in order to give the Court jurisdiction. In *Pryse* v. *Pryse* (4) questions were raised of legal limitations at the instance of a Plaintiff not in possession, and Vice-Chancellor *Wickens* declined to make any order or to entertain any fictitious question as to title-deeds or accounts in order to found jurisdiction. The Vice-Chancellor there commented upon *Forsbrook* v. *Forsbrook*, and said it went further than any previous case.

It is therefore submitted that the Court cannot decide this question in the absence of those who are likely to be interested in it, and who are not yet *in esse;* and also that, as it would be decidedly injurious to the parties to have a decision now, the Court will exercise the authority given by the 14th section of Sir *George Turner's Act* (13 & 14 Vict. c. 35), by refusing to decide a question if it is of opinion that such question cannot properly be decided upon a special case.

(1) 10 Hare App. xiv.
(2) 2 J. & H. 122.
(3) Law Rep. 3 Ch. 93.
(4) Ibid. 15 Eq. 86.

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Fry, Q.C., and *Ingle Joyce*, for the testator's daughters, who were unmarried, followed the same argument, and submitted that they had a substantial interest in having the question decided at the present time, and cited *Re Sheppard's Trusts* (1).

Argument.

Bristowe, Q.C., and *Everitt*, for the infant daughter of the married daughter of the testator.

Glasse, in reply:—

The Plaintiff has a present interest which would entitle him to present a petition for the appointment of new trustees, or to file a bill to administer the estate; he is therefore entitled to call upon the Court, under the 14th section of Sir *George Turner's Act*, either to dismiss the special case or to decide his rights under the will. The idea of raising the question by this means was suggested by the course taken in *Bell* v. *Cade* (2), and this Plaintiff's right is made plain by the view taken by Lord *Westbury* in *Davis* v. *Angel* (3), where it was laid down by his Lordship that an existing interest, whether vested or contingent, however remote it might be, gave the person having such interest a right to call upon the Court to preserve the property. That is a clear authority for this special case, which the parties have agreed to as being most beneficial for their interests.

Judgment.

MALINS, V.C.:—

This is a special case submitted for the opinion of the Court upon the construction of the will of Mr. *Tyndall*, who was a well-known banker at *Bristol*, and who left a very large fortune. He died leaving six daughters surviving him, who are all still alive. The property is given in this way: After the death of his daughters, the share of each daughter is given to the sons of the daughters who shall attain twenty-one, and to the daughters of the daughters who should marry under twenty-one, omitting the usual provision that the property shall vest in daughters who attain twenty-one or marry under that age.

Now, a question which is considered of very great importance

(1) 4 D. F. & J. 423. (2) 2 J. & H. 122.
(3) 4 D. F. & J. 524.

has arisen, whether in the event of a daughter having daughters who attain twenty-one, and do not marry before, they take a vested interest. On one side it is said that it is most desirable to have that question now decided while the daughters have none but mere infant children. It is true that the question has not yet arisen, because every daughter may have daughters who may marry under twenty-one, and may have no daughter who does not marry under twenty-one, in which case the question will never arise. On the other hand, it may be that none of the daughters will have a daughter who marries under twenty-one, but who may attain twenty-one without having married, or may marry after that age—some may marry and some may not. Some day or other, no doubt, that question will have to be decided. At present I have not heard the arguments on that point; but if I could be certain of arriving at the conclusion that every daughter who either attains twenty-one or marries takes a vested interest, then I think that would be a declaration clearly for the benefit of the family. If, on the other hand, I should arrive, upon argument, at the opposite conclusion, then I think it would be most injurious for the interests of the family, and it would be most injurious to the daughters who may hereafter come into existence, and attain twenty-one without having been married. I agree with Mr. *Pearson* that, considering the momentous consequences which would follow upon such a construction of the will, it is far better to leave the question open than prejudice the daughters, or rather exclude them, by arriving at a decision that no daughter who does not marry under the age of twenty-one takes a vested interest. I think it far better to leave such a question to be decided by a family arrangement, if the event should ever arise, and of course nobody can say whether it will or will not. This is not a litigation, but a special case, stating the facts for the purpose of obtaining the opinion of the Court. Mr. *Glasse* says that the Plaintiff, Mr. *Bright*, by virtue of the assignment stated in the special case, has an interest, and that the Court is, therefore, bound to decide what that interest is, or whether it is an interest at all. It is impossible not to see, and, indeed, it is all but avowed, that that deed has been executed simply for the purpose of raising the question; and therefore it is just the same as if the case had been brought

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before me without that deed, simply asking the question whether any daughter of a daughter, that is, any granddaughter of the testator, who attained the age of twenty-one years without having married, could take a vested interest.

Now, is there any necessity for deciding such a question? The Act of Sir *George Turner* giving power to the Court to determine the question upon a special case is, in my opinion, a very valuable one, so valuable that I am surprised it is not had recourse to more frequently than it is. That Act is to give power to persons interested in questions cognizable in the Court of Chancery to state special cases for the opinion of the Court; but the framers of the Act, foreseeing that questions of difficulty and nicety might arise where it would not be desirable that they should be decided by anticipation, provides, in the 14th section, "That it shall be lawful for the said Court, upon the hearing of any such special case as aforesaid"—one question is, what is the meaning of "the hearing;" and Mr. *Fry* has suggested that I am only to decide this point when I have heard the whole case argued; but I think it means when the Court has heard the case sufficiently to enable it to see what the question is to be determined—"Provided, also, that if, upon the hearing of such special case as aforesaid, the Court shall be of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the said Court may refuse to decide the same."

In order to prove that I ought to entertain this question and decide it, Mr. *Glasse* and Mr. *Fry* have particularly relied on the case of *Bell* v. *Cade* (1). That case was as proper a case, as it ultimately turned out, for decision under the Act as I can possibly conceive. There there was a mother, who was tenant for life with remainder to the children who should attain twenty-four, which if it stood alone would have made the limitation to the children void for remoteness; but there being a clause for maintenance the question to be argued was, whether the clause for maintenance did not control and restrict the limitation which, *per se*, would be void for remoteness; and there was a son, who, I understand, was of age, and who, therefore, was most desirous of knowing whether, subject to his mother's life estate, he had or had not an interest,

(1) 2 J. & H. 122.

because if the limitation was void for remoteness he had no interest whatever, and if it was not void for remoteness, he and his mother between them were entitled to the property absolutely, and between them could do as they liked with it. That was pre-eminently a case to be decided as early as possible, and accordingly the Vice-Chancellor Sir *William Page Wood* so considered it, and gave facility for altering the case so as to raise the question; and upon argument, he decided that the limitation was not remote, and, consequently that, subject to the life interest of his mother, the son was absolutely entitled to the property.

Now, the inconvenience of deciding such cases as this by anticipation is manifest. Suppose I were to come to the conclusion that no daughter that does not marry under twenty-one can take an interest, then I have taken away from the daughter, if such an event should arise, the chance of making the best she can of such a case when it does arise; and I have by anticipation made a declaration that she does not take an interest when there is no occasion for doing so whatever. The only reason suggested to me is that these young ladies when they marry ought to know whether the sons and daughters are to take, or whether only the daughters of a particular class are to take, viz., those who marry under twenty-one. I cannot regard that as a circumstance which renders it absolutely necessary that this question should now be decided. That the Court will not, in all cases, decide such questions as a matter of course is most formally decided in *Garlick* v. *Lawson* (1) by Vice-Chancellor *Wood*, the same learned Judge who decided *Bell* v. *Cade* (2). In *Garlick* v. *Lawson*, the Court refused to make a declaratory decree upon a special case in the lifetime of the tenant for life, with regard to the interests of the parties entitled in reversion. There never was a case, in my opinion, in which it was more important than in this, that no declaration should be made by anticipation against those daughters who may come into existence, and who may live to attain twenty-one without having married. Vice-Chancellor *Wood* says (3): "A declaration in the lifetime of a tenant for life with regard to the interests of the parties entitled in reversion, could not have been made in a cause at the time that statute passed, and therefore could not have

(1) 10 Hare, App. xiv. (2) 2 J. & H. 122.
(3) 10 Hare, App. xv.

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been made on a special case. Then came the late Act, which merely said that a suit should not be open to objection on the ground that a merely declaratory decree or order was sought. It enabled the Court in its discretion, where it should appear to be necessary for the administration of an estate "—which it clearly is not here—the estate must be divided into six parts, and it must be held as long as the tenant for life can have it, and when the tenant for life dies, then it will have to be distributed, and if there should be daughters who have attained twenty-one without having married, the question must then be decided whether they do or do not take vested interests; but to resume, the Vice-Chancellor says: "It enabled the Court in its discretion, where it should appear to be necessary for the administration of an estate or to the relief to which a Plaintiff might be entitled, to make a decree, notwithstanding it should be merely declaratory; but this was not a case in which it was necessary to do so." The Vice-Chancellor decided to the same effect in the case of *Greenwood* v. *Sutherland* (1), and refused to make a declaration as to the interest of persons who might be entitled in reversion. It was just as important in that case as it is in this, that the question should be raised.

In the case of *Forsbrook* v. *Forsbrook* (2), the Lords Justices allowed the statement to be altered by raising the question whether the tenant for life was or was not entitled to commit waste. That was for the purpose of having a decision upon a question which it was important should be decided then. In this case it is of no importance to decide the question now: it is a mere fanciful point, in my opinion. Then, Mr. *Glasse* in his reply cited and very much relied upon a case before Lord *Westbury* of *Davis* v. *Angel* (3), which was not a special case at all; but Lord *Westbury* there laid down the rule as to cases in which the Court will enter into a question and cases in which it will not. He says (4): "I am prepared to admit that an existing interest, whether it be vested or contingent, however future or remote, may, if it be a present interest, form the foundation of a right in the party representing it to come here with a bill to have the share secured. While the existence of such an interest interferes with the share being paid over by the trustees, it will warrant an application to the Court to

(1) 10 Hare, App. xii.
(2) Law Rep. 3 Ch. 93.
(3) 4 D. F. & J. 524.
(4) Ibid. 529.

secure it. But although the distinction is a fine one, yet it perfectly exists, and is easily apprehended—I mean the distinction between an interest that has arisen and is represented, and an interest that has not arisen, and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred, and upon which it is made to hang, may hereafter occur. The latter is not an interest—it is not a right—it is nothing more than a bare expectation of a future right. The expectation of a future interest, or rather of a future event that may give an interest, is not a thing which would justify a Court of Equity in entertaining a suit at the instance of a party having that and nothing more." That is, he says that he has an interest, or he wants to have the opinion of the Court whether he has an interest; so here it may happen that some one or more of these daughters may have daughters and nothing but daughters who attain the age of twenty-one, and do not marry; and it may happen, therefore, that the Court would come to the conclusion that no daughter who did not marry under twenty-one took a vested interest in this property—a conclusion which I think any Court would most reluctantly come to. I would rather leave the matter entirely open; and, therefore, I come to the conclusion, in the exercise of the discretion which is reposed in me by the 14th section of the Act, that this is not a case in which I ought by possibility to run the chance of deciding such a point against those ladies if they ever come into existence, when there is no necessity for such a decision being arrived at.

I decide, therefore, that the case is not a proper one to be determined now.

The order I shall make will be the same as was made in the case of *Moore* v. *Moore*, which Mr. *Teesdale*, the Registrar, informs me was made by Vice-Chancellor *Wood* on the 8th of December, 1856, and is in *Seton* on Decrees (1). This Court being of opinion that the question raised cannot be properly decided at the present time, doth decline to decide the same. The costs of all parties will come out of the estate.

Solicitors for Plaintiff: *Tatham, Procter, Tatham, & Procter.*
Solicitors for Defendants: *Merediths, Roberts, & Mills.*

(1) Page 320.

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In re METROPOLITAN BUILDING ACT. *Ex parte* McBRYDE.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122)—*Appointment of Umpire* —*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125).

Where surveyors had been nominated under the *Metropolitan Building Act*, 1855, to settle differences in dispute between a building owner and an adjoining owner as to the erection of a party-wall, and such surveyors had refused to appoint an umpire, the Court appointed an umpire, under the *Common Law Procedure Act*, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party-wall.

Statement.

THIS was an adjourned summons, upon an application by *James M. McBryde* and *Thomas W. Orr* (the building owners of the premises known as No. 10, *Jewin Crescent*, in the city of *London*), that an umpire or third arbitrator might be appointed to act with the surveyors appointed by them and by *Robert Warner* (the adjoining owner of the premises known as No. 9, *Jewin Crescent*), to settle the matters in dispute between such building and adjoining owners respectively, under the *Metropolitan Building Act*, 1855 (18 & 19 Vict. c. 122.)

A notice had been served on *R. Warner* by *McBryde* and *Orr* on the 19th of March, 1876, pursuant to the *Building Act*, s. 85, with reference to the party-wall between No. 9 and No. 10, *Jewin Crescent*, and it was therein stated that *McBryde* and *Orr* proposed to brick up all the openings in such wall, and that they had appointed *Herbert Ford* and *R. L. Hesketh* as their surveyors to superintend the work, and to settle on their behalf all matters of difference that might arise in relation thereto. The name of *Hesketh* was subsequently withdrawn, and *H. Ford* was named as the sole surveyor. On the 29th of March, 1876, *R. Warner* wrote to inform *McBryde* and *Orr* that he had appointed *Frederick Todd* as his surveyor.

In April, 1876, an action was commenced by *R. Warner* against *McBryde* and *Orr*, and the *Goldsmiths' Company*, for an injunction to restrain the Defendants from erecting any building on the site of No. 10, *Jewin Crescent*, and from doing anything which should

have the effect of darkening or interfering with the windows or ancient lights in the Plaintiff's premises at No. 9, *Jewin Crescent*.

An injunction was moved for, and on the 25th of May, 1876, Vice-Chancellor *Malins* refused the application, and this decision was afterwards affirmed by the Court of Appeal.

On the 1st of August, 1876, a notice was served by *McBryde* and *Orr* upon *H. Ford*, their surveyor, and *F. Todd*, the surveyor of *R. Warner*, requiring them to appoint an umpire or third surveyor, pursuant to the 85th section of the *Building Act*, sub-s. 7, in consequence of differences having arisen between *McBryde* and *Orr* and *R. Warner* with regard to the party-wall, and it appeared that *H. Ford* was ready to act in accordance with that notice, and appoint an arbitrator, but *F. Todd*, acting under the direction of *Warner*, refused to appoint such arbitrator.

Statement.

J. Pearson, Q.C., and *Ferrers*, in support of the summons:—

Argument.

Our present application is that, since the two surveyors appointed under the *Building Act* by the building owner and the adjoining owner have neglected to appoint an umpire after notice served upon them, the Court will take upon itself to appoint such umpire, under the powers given by the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), s. 12. That section is a clear authority for any Judge to appoint an umpire where differences arise in an arbitration, and the arbitrators refuse to appoint one. Unless this is done our building operations will be stopped, and much injury will be done to us.

Glasse, Q.C., and *Nalder*, for *R. Warner*:—

The object of this motion is to obtain by a side-wind that which is the subject of the suit now pending between the parties. The real difference which has arisen between them is with reference to the window situate in the house No. 9, *Jewin Crescent*, the owner of which is Mr. *Warner*. In the suit of *Warner* v. *McBryde*, an injunction was moved for to restrain *McBryde* and *Orr*, and the *Goldsmiths' Company*, who are the ground landlords, from interfering with that window, and the injunction was refused, but that does not settle the question, and until after the hearing of the cause the present Plaintiffs can have no power to block up the

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light. The surveyors have no power to settle that question, which is not one that arises under the *Building Act.* It was decided in *Titterton* v. *Conyers* (1) that the owner of windows in an edifice carried up above a party-wall contrary to the provisions of the *Building Act* might nevertheless recover against the owner of the adjoining land who contributed to the wall, for darkening the lights. And *Wells* v. *Ody* (2) is an authority that the *Building Act* (14 Geo. 3, c. 78), which authorizes the building or raising of a party-wall, does not protect a party from liability for any collateral damage resulting from the building so erected, and an action on the case is maintainable by the occupier of an adjoining house for heightening a building on a party fence-wall, whereby his windows are darkened. The same principle is laid down in *Crofts* v. *Haldane* (3) and *Weston* v. *Arnold* (4).

The Court has no power to appoint an arbitrator under the *Common Law Procedure Act* in an arbitration arising under the *Building Act.* The words of the 12th section are, "If in any case of arbitration, the document authorizing the reference;" and it cannot be said that a subsequent Act of Parliament is a document authorizing the reference within the meaning of that section.

Another objection is, that the motion should have been against the two surveyors, *Ford* and *Todd*, and not against the Defendant. It is for the surveyors themselves to appoint an arbitrator or third surveyor, and not for Mr. *Warner* to do so. The notice to appoint such arbitrator was served upon the surveyors, and the motion should have been made against them.

J. Pearson, in reply, referred to *In re Lord* (5), in which Vice-Chancellor *Wood* decided that the 12th section of the *Common Law Procedure Act*, 1854, applied to any case of arbitration where the parties could not agree in the choice of an arbitrator.

Judgment.

MALINS, V.C.:—

I may be entirely mistaken in my conception of this case, but it has appeared to me from the beginning to be one of the

(1) 5 Taunt. 465.
(2) 1 M. & W. 452.
(3) Law Rep. 2 Q. B. 194.
(4) Ibid. 8 Ch. 1084.
(5) 1 K. & J. 90.

simplest kind, and my surprise has been that the ingenuity of counsel could have made the arguments last for so long a time. I will take the case as if there were no pending suit between the parties, and it stands thus: *Warner* and *McBryde* are owners of adjoining tenements. *McBryde* is about to rebuild his tenement, which is No. 10, *Jewin Crescent*. In such a case the *Metropolitan Building Act* (18 & 19 Vict. c. 122), s. 85, provides by the 7th subsection, that in all cases not thereby specially provided for, where a difference arises between a building owner and adjoining owner in respect of any matter arising under this Act, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor or three surveyors, or any two of them, shall settle any matter in dispute between such building and adjoining owner, with power by his or their award to determine the right to do and the time and manner of doing any work, and generally any other matter arising out of or incidental to such difference.

In this case there is no language too strong to express the amount of difference which has arisen between the building and adjoining owners. Under these circumstances, *McBryde* and *Orr* on the one side, and *Warner* on the other, appointed each of them a surveyor. *McBryde* appointed *Ford*, and *Warner* appointed *Todd*. Then, when they were appointed, what was the duty cast upon them? It was their duty to appoint a third surveyor as umpire, who might decide upon any difference that should arise between them. It appears that *Ford* is willing to appoint an umpire, but *Todd* declines to appoint, because he is forbidden to do so by *Warner*, who employs him. What then is to be done? This is an arbitration, and it is provided by the *Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), s. 12, that if in any case of arbitration the document authorizing the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after a difference has arisen, concur in the appointment of an arbitrator, or if where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator, then in every such instance any party may serve the remaining parties or the arbitrators,

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as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of Law or Equity at *Westminster*, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, who shall have the like power to act in the reference and make an award as if he had been appointed by the consent of all parties.

It was gravely contended for the Plaintiff that this clause does not apply to an arbitration under the *Building Act*, because that Act is not a "document" within the meaning of the 12th section; but, in my opinion, the clause applies in every case where an arbitration is to take place, whether the reference to arbitration is to be by a document in the strict sense of the word, or by parol, or (as in the present case) by an Act of Parliament, and the plain object of the Legislature was that, if the parties to an arbitration refused to appoint an umpire, then that the Court might appoint one for them. I am glad to find this view was entertained by Vice-Chancellor *Wood* in *In re Lord* (1); that case meets with my entire approbation, and I think, therefore, that this case does come within the 12th section of the *Common Law Procedure Act*. It appears that one of the surveyors, Mr. *Todd*, is prevented from doing his duty at the bidding of his employer. Now, it is provided by the Act that if the parties do not appoint an umpire or third arbitrator, then the parties may serve the remaining parties or the arbitrators with a written notice to appoint an arbitrator, umpire, or third arbitrator. It is contended that the parties themselves are not the persons to be so served with this summons, but the surveyors. That argument I dissent from, and I think that in this case the parties have been properly served. Then the Act says that if within seven days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the superior Courts of Law or Equity, upon summons to be taken out by the party having served such notice, to appoint an arbitrator, umpire, or

(1) 1 K. & J. 90.

third arbitrator. That is if the parties refuse, then it falls to the Court to do for them what they refuse to do for themselves, and to appoint an umpire to decide any differences which arise between them.

That would have been my decision if there had been no pending suit; but it is said that the Court must not interfere in this case because of the existing suit. It is true that *Warner* commenced an action against *McBryde* and *Orr* for an injunction to restrain them from interfering with a small window which exists in the party-wall. The motion for an injunction was made before me, and, on the 25th of May, I decided that the Plaintiff had not made out a case for the interference of the Court by injunction. That decision was taken before the Court of Appeal, who came to the same conclusion, that there was no case for interference by injunction, and so the matter stands at present. I agree with Mr. *Glasse* that that decision is not conclusive, because when the suit comes on at the hearing upon further evidence I may take a different view of the matter, and I may ultimately decide that *Warner* is entitled to the use of this window. But it is argued that on account of this pending suit there can be no appointment of arbitrators; if so, it would follow that whenever an adjoining owner wished to vex his neighbour, the building owner, and prevent him from proceeding with his building operations, he has only to file a bill in this Court and refuse to appoint an umpire, and the mere fact of the pending litigation (however ridiculous the litigation may be) will have the effect of paralyzing the arm of the Court. It is unnecessary to refer to the argument that this is an attempt by a side-wind to effect what is the object of the suit, because it is quite certain that a surveyor appointed under the *Building Act* can have no power to decide the question of ancient lights which is raised in the suit. All that the surveyors are to decide is, in what manner and under what circumstances the party-wall is to be built, and if they shall fail in their duty, and should do anything to affect the question as to ancient lights, it will be disregarded by the Court as being beyond their powers, and entitled to no consideration. I cannot, therefore, come to the conclusion that the right of the building owner to have an umpire appointed is to be interfered with because of the pending suit. In the case of *Cartwright* v. *Last*,

V.-C. M. 1876 *In re* METROPOLITAN BUILDING ACT. *Ex parte* MCBRYDE. Judgment.

which I decided yesterday, the Defendant had built up a portion of his house pending the litigation, and I ordered it to be pulled down. So in this case, as in *Cartwright* v. *Last*, if the building owners, with full notice of the Plaintiff's claim to this window, go on to erect their house and to infringe any right which the adjoining owner may have, I shall have no hesitation in ordering them to undo what they have improperly done. Under these circumstances I accede to the application, and decide that the opposing party has entirely failed.

Pearson, Q.C., then asked for the costs.

Glasse, Q.C., said the Court had no power to give costs.

MALINS, V.C.:—If a vexatious litigant will oppose what he is not justified in opposing, I shall give the other party the costs.

Pearson, Q.C., asked the Court to appoint an umpire at once, without a reference to Chambers.

MALINS, V.C.:—Yes, I think that will be the best course; and if there is no objection, I will appoint Mr. *Christopher*, the surveyor who gave evidence in the case of *Cartwright* v. *Last*. My order will be—It appearing that *McBryde* and *Warner* have each appointed a surveyor, and such surveyors not having appointed an umpire, the Court appoints Mr. *Christopher* to be the umpire or third arbitrator, if he is willing to act, to settle the matters in dispute between the parties, under the 7th sub-section of the *Metropolitan Building Act;* and Mr. *Warner* must pay the costs of the adjournment of the summons into Court.

Solicitors: *Prideaux & Son; J. W. Sykes.*

In re PATTISON'S DEVISED ESTATES.
In re PATTISON'S SETTLED ESTATES.

V.-C. M.
1876
Dec. 8.

Railway Company—Money paid into Court—Costs of two Petitions for Payment out.

Two petitions were presented by the same Petitioners for payment out of Court of money paid in by a railway company. The Petitioners were entitled to part of the money under a will, and to the other part under a settlement. The trustees of the will were made parties to one petition, and the trustees of the settlement to the second petition, and both sets of trustees appeared by separate solicitors and counsel:—

Held, that the statements in the two petitions should have been included in one, and the company were ordered to pay the costs of the first petition and five guineas only towards the Petitioner's costs of the second petition, and three guineas for the costs of each set of trustees.

Statement.

THESE were two petitions presented for the purpose of getting out of Court certain funds representing the proceeds of lands taken by the *Wilts, Somerset, and Weymouth Railway Company*, which company was now merged in the *Great Western Railway Company*. Both petitions were presented by the Honourable Mrs. *Ashley*, the tenant for life, and her two unmarried daughters, the tenants in remainder of the lands and the funds representing them.

In the first petition the title of the Petitioners was derived under a will of one *Robert Pattison*, who died in 1845, which in effect devised the lands taken by the railway company to trustees for the testator's wife for life so long as she remained his widow, and after her decease in trust for the Petitioner, Mrs. *Ashley*, for life, with remainder in trust for her children by her husband, Mr. *Ashley* (who died in 1858). The testator's widow died in 1875. Mrs. *Ashley* had only two children of her marriage, and she and they together were now entitled to the fund which was represented by a sum of £3694 1*s.* 8*d.* £3 per Cent. Consols. An order had been made in 1848 for payment of the dividends to the three trustees and the survivors of them, and new trustees having been appointed in 1872, another order was made in 1873 for the pay-

V.-C. M. 1876

In re PATTISON'S DEVISED ESTATES.

In re PATTISON'S SETTLED ESTATES.

ment of the dividends to the new trustees and the survivors or survivor of them.

Statement.

In the second petition the title of the Petitioners was derived under a settlement made by the testator, *R. Pattison*, in 1842, whereby the lands taken by the company were conveyed to trustees in trust for Mr. and Mrs. *Ashley* and the survivor of them for their respective lives and the life of the survivor of them, and subject thereto upon the trusts of the testator's marriage settlement, by which certain moneys were settled in trust after the decease of Mr. and Mrs. *Ashley* for the children of their marriage, as they or the survivor of them should appoint, and in default, for the children equally. No appointment was made, and Mrs. *Ashley* having survived her husband, she and the children together were now entitled to this fund, which consisted of £321 £3 per Cent. Consols, and a considerable sum of cash, comprised of unreceived dividends. An order had been made in 1848 for the payment of the dividends to Mr. *Ashley* during his life, but no other order was made upon his death, in 1858, and the dividends had been accumulating since.

The trustees of the will were made Respondents to the first petition, and the trustees of the settlement were made Respondents to the second petition. They were represented by different solicitors, and in neither case the same solicitors as the Petitioners'. The two petitions were in the paper together on the same day, and the only question was as to the costs to be paid by the railway company. The trustees in each case appeared by different counsel.

Argument.

Borrett, for the Petitioners, submitted that, the title in each case being different, and the accounts different, the Petitioners were fully justified in presenting two petitions; that the tenant for life and those in remainder, by coming to get the fund out at once, were, in truth, saving the company the costs of any further petition.

Giffard, for the company, contended that the whole should have been done by one petition, and that at any rate the trustees ought to have joined as Petitioners or abstained from appearing on

tender of 40*s.* for costs. He referred to *In re Gore Langton's Estate* (1) and *In re Halstead United Charities* (2), and Additional Rules of Court, August, 1875 (Special Allowances), rule 17.

A. C. Eddis, and *Udall*, for the two sets of trustees.

MALINS, V.C.:—

Strictly speaking, I can only allow the costs of one petition, since all this story might have been included in one statement. The rule laid down in *In re Gore Langton's Estate* by myself, and in that respect affirmed by the Court of Appeal, and the decision in *In re Halstead United Charities*, are so definitive that no counsel, after those cases, should incur the expense of bringing before the Court persons who have no interest in the matter.

As there is some difference in the title set out in the two petitions, I will make this order—That the railway company do pay the Petitioners' costs of the first petition and five guineas towards their costs of the second petition; and that they do pay three guineas towards the costs of the trustees in the first petition and three guineas towards the costs of the trustees in the second petition; any surplus costs of the respective trustees to be paid out of the respective funds.

Solicitors for Petitioners: *Hunters, Gwatkin, & Co.*

Solicitor for Railway Company: *R. R. Nelson.*

Solicitors for the two sets of Trustees: *Dangerfield & Blythe; Nicoll, Newman, & Co.*

(1) Law Rep. 10 Ch. 328. (2) Law Rep. 20 Eq. 48.

V.-C. M.

1876

Dec. 8.

In re DAWES' TRUSTS.

Will—Construction—Period of Distribution—Surviving.

A testator gave a sum of stock to trustees, the interest to be paid to *A.* for life, and after his death the capital to be divided amongst the children of testator's late daughter *B.*, or their descendants, but should there be none of them surviving, then the capital to be equally divided amongst such other grandchildren as he might then have living, or in default thereof to his legal representative. *B.* had seven children, three of whom died without children in the lifetime of the testator; of the remaining four one alone survived, *A.*, the tenant for life; three died before *A.*, and only one of these three left issue:—

Held, that the words "should there be none of them surviving" referred to the testator's death, and that the children of *B.* who survived the testator took vested interests.

Statement.

HENRY DAWES, by his will, dated the 31st day of January, 1827, after directing payment of his debts, funeral and testamentary expenses, gave unto his executor and the trustees thereinafter named the sum of £10,000 stock in the £3 10*s.* per Cent. Annuities, in trust for the following purposes, that is to say, "I give and bequeath to Mr. *John Marlett Boddy* the interest arising from the sum of £2500 of the above-named stock for and during the term of his natural life, and from and after his decease I give and bequeath the aforesaid sum of £2500 to be equally divided amongst the children of my late daughter *Jane Maria Boddy*, or their descendants, but should there be none of them surviving, then my mind and will is that the said sum shall be equally divided amongst such other grandchildren as I may then have living, or in default thereof to my legal representative." And the testator directed that the remainder of the said sum of £10,000 should be divided amongst and paid to certain of his grandchildren therein named at the time and in the manner therein specified, and he appointed his son *H. J. Dawes* his sole executor.

Jane Maria Boddy had seven children, three of whom died in the lifetime of the testator without having been married, and four were living at the testator's death. Of the four who survived the testator, one alone survived the tenant for life, three of them died before the tenant for life, and only one of these three left issue.

V.-C. M. 1876 *In re* DAWES' TRUSTS. Argument.

Glasse, Q.C., and *Cooper Willis*, for the issue of the deceased child:—

The class of children to take under the will was ascertainable at the period of distribution, that is, the death of the tenant for life. The words "but should there be none of them surviving" must be referred to the death of the tenant for life, and the child now living who survived the tenant for life and the issue of the child who survived the testator but died in the lifetime of the tenant for life take *per capita* in equal shares.

Higgins, Q.C., and *Snape*, for the only child now living:—

The class of children is to be ascertained at the testator's death. It is the ordinary gift in remainder to children after a life interest, and the children who survived the testator took vested interests at his death. No child who died in the testator's lifetime left issue, and therefore the substitutional gift was inoperative. The rule is laid down in *Hawkins* on Wills (1); but if it is held that the class is ascertainable at the death of the tenant for life so as to let in the issue of the deceased child by substitution, the surviving child and the issue of the deceased child take *per stirpes* and not *per capita*: *Congreve* v. *Palmer* (2); *Timins* v. *Stackhouse* (3).

Glasse, in reply:—

There is no gift to children until after the death of the tenant for life.

Judgment.

MALINS, V.C.:—

This is a gift to children in remainder after the death of the tenant for life. The rule of law is that all gifts are to vest as early as possible, and the rule also is that where there is a gift to *A.*, and after his death to his children, it vests in the children of *A.* in existence at the testator's death, subject to be partially divested in favour of children coming into existence during the life of *A.*, and the words in the will "should there be none of them surviving" must be referred to the testator's death. And with regard

(1) Pages 71, 72.
(2) 16 Beav. 435.
(3) 27 Beav. 434.

V.-C. M. 1876 *In re* DAWES' TRUSTS. Judgment.

to the argument that there was no gift to the children until after the death of the tenant for life, I am of opinion that the words in the will, "from and after my decease I give and bequeath the aforesaid sum of £2500 to be equally divided between the children of my late daughter *Jane Maria Boddy*," are in effect the same as if the gift had been to *John M. Boddy* for life, with remainder to the children of *Jane Maria Boddy*. This question was considered in *Lainson* v. *Lainson* (1), and I myself decided the point in *Jull* v. *Jacobs* (2). The children of *Jane Maria Boddy* who survived the testator or their representatives are the persons entitled to take.

Solicitors: *J. Harwood; De Jersey & Micklem.*

(1) 18 Beav. 1; 5 D. M. & G. 754. (2) 3 Ch. D. 703.

In re STUART'S TRUSTS.

V.-C. B.
1876
Dec. 9, 14.

Company—Guarantee Fund to secure Payment of Dividends—Agreement that Fund be "considered as" Profits—Liquidation—Rights of Creditors—Companies Act, 1862, *s.* 38 (7).

By an agreement for the sale of mining property to a trustee for a company in formation, it was agreed that the sum expressed to be the purchase-money should be paid by instalments, and that so much of the last two instalments as was necessary to guarantee dividends at the rate of £7 per cent. on all the shares of the company issued to the public for four years should be invested in consols; the vendor guaranteed payment of the dividend; and it was provided that after each of eight half-yearly meetings, one-eighth of the fund should be sold out and paid to the directors. This guarantee was announced in a prospectus; and the agreement was referred to in the articles of association of the company, which was registered shortly afterwards. Of these articles, one provided that payments made to the directors out of the guarantee fund should be "considered as profits and applicable only to the payment of dividends."

Several sums having been paid to the trustees of the guarantee fund, and by them invested, and several sales and payments out having also been made by them, the company, before the expiration of the four years, went into voluntary liquidation, whereupon the trustees transferred and paid the funds in their hands into Court.

Upon petition under the *Trustee Relief Act*, by shareholders, claiming the funds as their private property in opposition to creditors:—

Held, that the funds did not belong to the shareholders individually; and order made that they be transferred and paid to the liquidator.

PETITION.

Statement.

By an agreement dated the 26th of February, 1872, between *James Meliss Stuart* of the one part, and *Edward John Lozey*, a trustee on behalf of the *Welsh Freehold Coal and Iron Company, Limited*, then in the course of formation, of the other part, it was agreed that *Stuart* should sell and the trustee should purchase for the sum of £103,500 the mining property in the county of *Glamorgan* therein described, and that the £103,500 should be paid as follows:—£15,000 in cash upon allotment of shares; £15,000 in cash fourteen days after allotment; £15,000 in cash at the expiration of fourteen days; £15,000 at the expiration of one month, and £23,500 and £20,000 at the expiration of three months and six months respectively, after the date of the second

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instalment; and it was agreed that "so much of the two last-mentioned instalments of £23,500 and £20,000 as is necessary to guarantee dividends at the rate of £7 per cent. per annum upon all the shares of the company issued to the public for the term of four years from the date of the first ordinary general meeting of the company," should be invested in consols. By the same agreement *Stuart* guaranteed payment of the dividend; and it was provided that immediately after each of eight half-yearly meetings, one-eighth part of the amounts directed to be invested should be sold out by trustees to be thereafter named, and by them paid to the directors, together with any dividends; and that the balance, if any, of the proceeds and income should be paid to *Stuart*.

A prospectus was thereupon issued, containing the following statement:—

"Guarantee. A contract has been entered into for the purchase of the estate with all its rights and appurtenances for £103,500, of which £45,000 is to be paid in cash, 15,000 in paid-up shares, and the balance to be invested in consols in the names of trustees for the purpose of guaranteeing the dividends. So satisfied is the vendor of the success which will attend the development of the resources of this estate and of the wealth of the iron and coal deposits, that he has guaranteed to the shareholders a minimum annual dividend of seven per cent. on the paid-up capital of the company for four years."

On the 26th of February, 1872, the company was registered with a capital of £155,000, in 31,000 shares of £5 each. The articles of association referred to the agreement of even date above mentioned, and stated that "every clause and provision therein contained is hereby adopted and confirmed."

The 92nd of the articles was as follows:—

"No dividend shall be payable except out of profits arising from the business of the company; payments made to the directors of the company out of the guarantee fund mentioned in the said agreement of the 26th day of February, 1872, shall be considered as profits, and applicable only to the payment of dividends."

By another agreement, dated the 24th of April, 1872, and made between *Stuart* of the one part, and the trustees of the other part,

the above agreement of the 26th of February, 1872, was altered, and *Stuart* agreed to accept in satisfaction of £41,000, part of the purchase-money of £103,500, the allotment of 8200 fully paid-up shares. As to the residue, namely, £62,500, £19,000 was to be paid in cash; and out of the two last instalments of £23,500 and £20,000, *Stuart* was to receive such sums only as should be equal to 28*s.* per share [This was at the rate of £7 per cent. on each £5 share for the four years during which the guarantee was to run] on the shares issued to the public (other than the 8200 agreed to be taken by him) before or during the term of four years from the first general meeting of the company—all such sums to be forthwith invested by *Stuart* as a guarantee fund in the manner mentioned in the agreement of the 26th of February, 1872; and so much of the two last instalments of £23,500 and £20,000 as should not be required to be invested was to be considered as given by *Stuart* as an abatement of the purchase-money.

In about June, 1872, a first dividend was paid, and a second was paid in or about December, 1872.

By an indenture dated the 16th of July, 1873, and made between *Stuart* of the first part, the company of the second part, and two trustees of the third part, after reciting that *Stuart* had recently invested £4772 5*s.* in the purchase of consols in the names of the trustees as a guarantee fund, on behalf of the company, and might thereafter invest other sums in the same manner and for the same purpose, it was thereby declared that the trustees should stand possessed of the fund in their hands for the time being upon trust on the 6th of January, 1874, to sell out one-sixth [Inclusive of the 6th of January, 1874, there were then only six half-yearly payments to be provided for] of the annuities, and pay the proceeds of the same and any intermediate income to the directors; and that at the end of every succeeding six months to the 6th of July, 1876, a similar fraction of the same annuities should be sold and paid as thereinbefore mentioned. By the same indenture *Stuart* covenanted with the company that dividends at £7 per cent. should, for four years from the first general meeting of the company, be paid on all the shares issued to the public, and that if the sums paid to the directors under the trusts aforesaid should at any time be insufficient to pay a dividend at the rate

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aforesaid, then *Stuart*, his executors or assigns, would on demand pay to the directors such sums as should be requisite to make good the deficiency.

In accordance with the deed sums of stock were from time to time purchased into the names of the trustees, and on the 9th of January and 10th of July, 1874, and the 14th of January and 10th of July, 1875, portions were sold out and paid to the directors.

On the 14th of September, 1875, a resolution was passed for the voluntary winding-up of the company, which was afterwards ordered to be continued under supervision.

The trustees paid the fund in their hands into Court, upon an affidavit filed on the 25th of September, 1875, in which they stated that the fund was claimed by, 1, *Stuart*, the vendor, who claimed subject to certain trusts which had ceased to exist; 2, the liquidator, on the ground that it was an asset of the company; and, 3, the shareholders, on the ground that it was appropriated as a guarantee to them personally.

Eleven of the shareholders, who were original allottees of shares, now filed a petition in the matter of the deed of the 16th of July, 1873, and of the *Trustee Relief Act*, praying in effect that the fund in Court might be paid and transferred to them.

The Respondents were the trustees, the vendor, and the liquidator.

Argument.

Swanston, Q.C., and *B. B. Rogers*, for the Petitioners.

Crossley, for shareholders who had purchased since the original allotment, supported the prayer of the petition.

Sir *H. Jackson*, Q.C., and *Dauney*, for *Stuart*, the vendor:—

We disclaim all interest in the fund. In the case of *G. & J. Brown & Co.* v. *Brown*, in this branch of the Court on the 25th of July last, *Brown*, the guarantor, was held to be released from the guarantee because the company had discontinued one of the businesses. In this instance we, having consented to the liquidation, are in no such position, and cannot claim any such exemption.

Kay, Q.C., and *H. Burton Buckley*, for the liquidator:—

The first object of a guarantee fund must be payment of credi-

tors. Nothing is divisible amongst shareholders until creditors are paid. The 92nd article does indeed say that the guarantee fund shall be "considered as profits." But profits cannot be made until debts are paid.

This is a direct attempt by shareholders to claim against their own creditors. Partners cannot pay themselves anything out of any fund which can by any means be recovered as assets of the firm of which they are members. No member of a company can bring his debt into competition with the debts of strangers: *Companies Act*, 1862, s. 38, sub-s. 7.

Miller, Q.C., for the principal creditor of the company:—

I support the same view.

The case is as if a sum had been placed *in medio* to await the result of a purchase, on the condition that if the property should turn out to be valuable the money should go to the vendor, if not, to the purchaser, and the purchaser were to become bankrupt. In such a case, would not the money go to the trustee in bankruptcy?

The agreement of the 16th of July, 1873, by the vendor was to pay the guarantee fund "to the directors," that is to say, for the general purposes of the company.

Edward Ford, for the trustees.

Swanston, in reply:—

The whole question is, what was the contract between the parties? The vendor agrees to guarantee a £7 per cent. dividend, the guarantee agreement is embodied in the articles, and express notice is given that the fund is to be applicable only to the payment of dividends.

It is contended that this money is part of the capital of the company. The answer is that the capital is defined to be £155,000, of which this forms no part.

Did the vendor covenant with the creditors? No; he covenanted with the company, that is to say, with the shareholders in a corporate form.

Sect. 38, clause 7, of the Act relates to debts due to members, no doubt; but debts due from whom? From the company; not

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such a debt as this, which is due from a vendor. The clause applies to cases where the company is indebted to a member for goods sold and delivered, or money had and received, and says that such a debt shall not compete with the debts of outside creditors.

Argument.

The moment this money got into the hands of the trustees it was impressed with a trust for the shareholders. If the argument on the other side be correct, it follows that Mr. *Stuart* will have to pay twice over, once to the creditors, and then to the shareholders. No consideration passed from the creditors to him; there was no inducement to him to contract with the company in their favour.

These sums must be taken into account to Mr. *Stuart's* credit with the company; and is he to pay twice over? His covenant is to make their income safe for four years; and are they to be told that the income is not safe, when the creditors knew that this money was to be treated as profits, that is to say, as money upon which they had no claim?

In the case put by Mr. *Miller*, no doubt the trustee in bankruptcy would recover, but here the creditor is one who has given credit to a debtor of limited liability.

The money is private property, and not part of the capital of the company.

Judgment.

BACON, V.C.:—

No doubt this is a case, as has been said, of entire novelty; but that fact, of course, does not exempt it from the application of the general rules established by the Legislature, and by the general law, respecting joint stock companies. If the case were, as Mr. *Swanston* has argued with great ability and clearness, only a case to be decided upon a contract between the parties, then, when it has been ascertained who are properly to be called the parties, there would be much less difficulty in the case than it presents in its existing aspect.

The contract is between Mr. *Stuart* and the company. The shareholders, as has been said, and as is quite true, can only act through the company. Now I find it unnecessary to go into the earlier history of the transaction. Mr. *Stuart* has an estate to sell. He contracts for a price; and it was no doubt for the purpose of

inducing persons to come in and take shares in the purchasing company that the stipulation with respect to the guarantee was stated in the prospectus. The guarantee formed a feature in the original contract. Mr. *Stuart's* confidence in the value of his property was so great, that he undertook to bear the burden of providing that the shareholders should receive a dividend, in other words profits, from carrying on the operations of the mine during the first four years. That is clear and plain; but then it was because he received the purchase-money that he took upon himself that burden. He took the money of the shareholders, and each man who paid his £5 for a share trusted that the company of which he was a member would see that contract carried properly into effect, and that he should have the benefit for which he stipulated.

The deed of 1873 is perhaps the most important of the several documents which have been referred to; and I therefore turn to the terms of it. It is made between Mr. *Stuart* of the one part, the company of the second part, and certain trustees of the third part. It recites that Mr. *Stuart* had recently invested £4772 5*s.* in the purchase of some stock, as a guarantee fund on behalf of the company. The contract is with the company, and with the company alone. The deed recites that Mr. *Stuart* might thereafter invest other sums of money in the same manner, and for the same purpose. Then it goes on to declare that the trustees shall be possessed of those funds upon trust to sell out in the manner mentioned. By the same indenture Mr. *Stuart* covenanted with the company "that dividends at the rate of £7 per cent. per annum shall, for the term of four years from the date of the first ordinary general meeting of the said company, be paid on all the shares of the said company issued to the public, and that if the sums paid to the directors under the trusts aforesaid shall at any time be insufficient to pay a dividend at the rate aforesaid, then, and so often as the same shall happen, he, the said *James Meliss Stuart*, his executors or administrators, will on demand pay to the directors of the said company such sums as shall from time to time be requisite to make good the deficiency." It is a contract between the parties, it is true, but the parties are *Stuart* and the company.

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The reason is obvious upon the facts which have been mentioned. The purchase-money being the sum specified in the contract, an abatement takes place, modifications are made, ultimately the purchase-money which Mr. *Stuart* is to receive is modified to the amount mentioned, and out of that purchase-money (I do not say that these words are in the contract), and from no other source than that, is derived the sum of stock which is now in question. How can I entertain any notion that individual shareholders are entitled to the benefit of this contract? It is a contract made with the company, subject to all the incidents of the company, and liable to all the laws applicable to joint stock companies. One plain feature in that law is that no shareholder can derive any benefit from the assets of the company, no matter from what source they come, until the debts of the company are paid, and the only contract to which it can be said that the shareholders are parties is that 92nd clause of the articles of association in which it is provided that "no dividends shall be payable except out of profits." The words of that clause, in my opinion, distinctly express the statement that the 7 per cent., whether derived from the business which the company carried on, or from the engagement of Mr. *Stuart* to make up the dividend, is to be derived from profits. By the contract to which the shareholders are individually parties, when Mr. *Stuart* performs his covenant with them, and transfers to the trustees that sum, it becomes the duty of the trustees to pay the directors, in order that the directors may declare a dividend. So that the money is profit, and nothing else, and there is no law in this country which sanctions a trader saying he will enter into a contract, by which any prospective benefit arising to him shall be exempt from the payment of his debts. That would be directly against the first principles of commercial law.

Then the company becomes insolvent. Mr. *Stuart*, it is said, performs his agreement by having invested these sums of money; and now the shareholders say, "We, who *quâ* shareholders are utterly bankrupt and unable to pay the debts which have been contracted for our benefit and in our name, will appropriate this sum which has no other source and origin, and can be ascribed to

nothing else, than that contract which we through our directors entered into."

The statute is unmistakeable upon this subject. It only expresses what would otherwise be the general law; but it is clear and distinct; and the articles of association have stated that the sums of money in question shall be considered as profits. Then, that there may be full justice done to the subject, the 38th section of the *Companies Act* provides that, such being the liability, and such being the extent of the rights of the shareholders, if there be a sum due to any member by way of profits or otherwise, such sum shall not be deemed to be a debt of the company payable in competiton between that member and any other creditor who is not a member of the company; but that any such sum may be taken into account for the purpose of finally adjusting the rights of the contributories amongst themselves. In the face of that section of the Act of Parliament, upon the very terms of the deed of 1873, and by the stipulation contained in the articles of association, I am of opinion that this claim of the shareholders, by which they seek to take away money that is first by law applicable to the payment of their debts, cannot be sustained. I think, therefore, that the claim of the Petitioners fails.

There will be an order that the funds be transferred and paid to the liquidator; the costs of all parties appearing on the petition will come out of the fund; the creditors and shareholders to have one set each.

Solicitors: *Miller, Smith, & Bell; Whitehouse; Bevan & Whitting; M. Harvey.*

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1876
Dec. 16.

In re CAERPHILLY COLLIERY COMPANY.

PEARSON'S CASE.

Company—Liability of Directors—Qualification of Directors—Misfeasance—Companies Act, 1862, *s.* 165.

The articles of association of a company provided that the qualification for the office of director should be the actual holding of twenty-five share warrants, each representing a single fully paid-up share in the company.

Each director was qualified by having twenty-five share warrants deposited by one of the promoters with the bankers of the company to the account, and at the order, of the director:—

Held, upon liquidation, that a director was liable, under the 165th section of the *Companies Act*, 1862, to pay to the liquidator a sum equal to the nominal value of twenty-five shares.

Statement.

ADJOURNED summons by the official liquidator of the *Caerphilly Colliery Company, Limited*, that Sir *Edwin Pearson*, one of the former directors of the company, might be ordered to pay to the official liquidator the sum of £125 in respect of the twenty-five shares of £5 each held by him in the company, he having, as one of such directors, been guilty of misfeasance within the meaning of the 165th section of the *Companies Act*, 1862.

Amongst the articles of association of the company, which was registered on the 12th of April, 1869, was the following:—

10. "The qualification for the office of director shall be the actual holding of at least twenty-five share warrants, each representing a single fully paid-up share in the company, and such share warrants shall, during the period each director remains in office, be deposited in his name with the bankers for the time being of the company, or with such other person or persons or in such place or places as the company shall in general meeting direct or appoint. A director shall be at liberty at any time to withdraw his share warrants from such deposit as aforesaid, but immediately upon his doing so he shall cease to be qualified to act, and shall no longer act as such director."

From the evidence in support it appeared that the colliery and mines were purchased from a Mr. *Bridell* on behalf of the company; the terms of the agreement being that £7000 should be

paid in cash and £7000 in fully paid-up shares to the vendor. In pursuance of this agreement, a sub-lease to the company was executed by *Bridell* on the 31st of December, 1869. In further pursuance of the agreement, £7000 was paid in cash to *William Hannam*, who was a promoter, then having in his charge the carrying out of the agreement, and share warrants for 1400 shares of the nominal value of £5 each were also handed to *William Hannam*; *Bridell* being in fact a trustee for *William Hannam* and others who were the real vendors. The cash and share warrants were dealt with by *William Hannam* as agent for the vendor.

Among the subscribers to the memorandum of association, and the first directors subsequently appointed at a meeting of the 1st of July, 1869, was Sir *E. Pearson*, and the affidavit of Messrs. *Moore & Delatorre*, who were also promoters of the company, stated that "when the said directors were appointed they were each presented with share warrants for twenty-five of the said 1400 shares in the said company by the said *William Hannam*, for the purpose of qualifying them to act as such directors, but they did not pay anything for such share warrants or for their qualification. No cash was ever paid to the said company for the said shares given to the said directors, or any of them."

From an entry in the security book of the company's bankers, it appeared that twenty-five share warrants had been deposited with the bank by Sir *E. Pearson*, amongst others; also that Sir *E. Pearson* withdrew his twenty-five share warrants from the bank on the 3rd of May, 1873, and in the book was written a receipt for the share warrants so withdrawn in Sir *E. Pearson's* handwriting.

Sir *E. Pearson*, in an affidavit in defence, said, "I deny that I was presented with share warrants for any of the shares, or with any of the share warrants issued by the company in pursuance of the agreement between *Edmund James Bridell* and *George Hannam*, or in fact that I was ever presented with any shares or share warrants of the company at all. The share warrants of the company that were deposited as qualifying me for the office of director were purchased by me *bonâ fide* for valuable consideration, without notice on my part of any informality or defect therein, or that the shares in respect of which the same were issued were not

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Statement.

fully paid up in every sense and for every purpose whatsoever." He denied that he agreed or consented to become a director upon the terms of the share warrants necessary for his qualification being provided for him. "*William Hannam* . . . was indebted to me in a sum of at least £100 in respect of business transactions I had had with him. In liquidation of this debt, and in settlement of the accounts between us, he agreed to furnish me with the twenty-five share warrants to be deposited with the bankers of the company, and he did furnish me with such twenty-five share warrants accordingly. I have no knowledge as to where or how he acquired the said twenty-five warrants, but to the best of my knowledge, remembrance, information, and belief, the same were no part of 1400 share warrants issued to the vendor . . ."

The above-named deponents were cross-examined; and *William Hannam* and Mr. *Blount*, a clerk of the official liquidator, were examined in chief, in Court, with the results appearing in the judgment.

Argument.

Kay, Q.C., and *Method*, in support of the summons:—

Instead of seeking to place Sir *E. Pearson's* name on the list of contributories, this form of proceeding has been taken under the 165th section, on the authority of *McKay's Case* (1), followed by *De Ruvigne's Case* (before *Malins*, V.C., Nov. 11, 1876).

Ingle Joyce, for Sir *E. Pearson*:—

No case of misfeasance has been made out. There is not present here the element of a secret agreement, which was the characteristic of *McKay's Case*. There the vendor agreed to give the agent of the company 500 shares for his trouble. Nothing of the kind is asserted in this instance.

Nor is the evidence to be believed that these twenty-five shares formed part of the vendor's paid-up shares.

Judgment.

BACON, V.C.:—

It is of the utmost importance to the well-being of joint-stock companies, as they now exist, that the law with respect to them

(1) 2 Ch. D. 1.

should be strictly obeyed. Especially is a course of fair and plain dealing necessary in the case of those who have the conduct of pecuniary affairs in which other persons are interested.

The charge against Sir *Edwin Pearson* is that Mr. *William Hannam*, being a promoter of the company, agreed to qualify the directors by presenting them with the necessary number of share warrants—of these directors Sir *E. Pearson* being one. This charge is very faintly denied. In what I must call an equivocal affidavit, Sir *E. Pearson* says: "I deny that I was presented with share warrants for any of the shares, or with any of the share warrants issued by the company, in pursuance of the agreement . . . or in fact that I was ever presented with any shares or share warrants of the company at all."

Now consider what the evidence is. Sir *E. Pearson* has been asked to make out that he was a purchaser of these shares. Mr. *Hannam* denies there was any sale or purchase. Sir *E. Pearson* is unable to say that there was any debt on which he could have recovered, or which was the result of any contract existing between himself and *Hannam*. Sir *E. Pearson's* affidavit goes on: "The share warrants of the company that were deposited as qualifying me for the office of director were purchased by me *bonâ fide* for valuable consideration." [His Lordship quoted the rest of the passage extracted above.] But the existence of this alleged debt of £100 is utterly disproved. The handing over of these share warrants was therefore a gift, and though the share warrants were not handed to Sir *E. Pearson* personally, but were deposited with the company's bankers, they remained there only for a time, and were withdrawn by Sir *E. Pearson* upon his receipt, and then passed to him.

If it were necessary to go further, the evidence establishes the fact that Sir *E. Pearson* then claimed to be the owner not only of these shares, but of a larger number of shares than these, on the ground that he had rendered certain services to the company.

But inasmuch as it is quite unlawful for a director, whether by becoming the holder of shares treated as fully paid up or otherwise, to bargain and sell his services as an officer of the company for any such consideration as this, the summons must be allowed.

I should have had no difficulty in coming to this conclusion

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without the Act of Parliament, but the statute places the matter beyond question.

There must be an order on Sir *E. Pearson* to pay the £125 within a fortnight after service, together with the costs of this summons.

Solicitors: *Bolton & Co.; H. C. Godfrey.*

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GALE *v.* SQUIER.

[1876 G. 96.]

Vendor and Purchaser—Sale under Conditions—Frame of Conveyance.

Trustees for sale of a freehold messuage and hereditaments, who sell under a condition that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any," are entitled to have the words "subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any," inserted in the habendum of the conveyance, although it is not shewn, nor asserted, that the property is subject to any of the liabilities so specified.

Statement.

TRIAL OF ACTION.

The writ was issued by *George Gale* and *John Hatch Trumper* against *Samuel Westwood Squier*, and indorsed with a claim for specific performance.

The Plaintiffs were trustees for sale of a freehold house and two cottages and gardens in the parish of *Laindon, Essex*, and on the 26th of June, 1876, they put this property up for sale by auction in a lot, together with other property in other lots, under conditions, of which the following was one:—

"The property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements (if any), and to all liabilities to make and maintain roads or fences, or other liabilities of a like nature, and to all existing tenancies thereof, and all rights and claims of what kind and nature soever (if any) of the tenants, without any obligation on the part of the vendors to define any such rights or claims."

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Statement.

At the sale the Defendant, *Squier*, became the purchaser. The title was accepted, and the Defendant's solicitor prepared the draft conveyance. Upon its being sent, the Plaintiffs' solicitors desired the insertion of the following words: "Subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any, and to all liabilities to make and maintain roads and fences, or other liabilities of a like nature, and to all existing tenancies thereof, and to all rights and claims of what kind and nature soever, of the present tenants."

The Defendant's solicitor objected to the insertion of the words on the ground that there were no quit rents, incidents of tenure, or easements, to which the words could apply, and that the condition was wholly inapplicable to this property. Plaintiffs' solicitors replied that the trustees were entitled under the conditions to the insertion of the words, but that they would consent to the omission of the reservation if the Defendant would sign a letter to the effect that the omission should not be regarded by the writer as a waiver of the condition, but that he would take and hold the property as purchaser, subject to such of the matters referred to in the condition, if any, as might affect the property.

This the Defendant refused to do, whereupon the action was brought.

Argument.

Kay, Q.C., and *Herbert Lake*, for the Plaintiffs:—

Suppose there should be any of these rights in existence, the trustees, without these words, will be personally liable.

Sir *H. Jackson*, Q.C., and *Nalder*, for the Defendant:—

The Plaintiffs admit that the ordinary common form of condition is, "the property is sold subject to all chief and other rents, rights of way and water, and other easements, if any, charged or subsisting thereon." In this condition the additional words are, "and will be conveyed;" and upon these words the Plaintiffs attempt to draw a distinction in the practice of conveyancing.

The meaning of the condition is, that if, upon examination, it should turn out that there are any easements such as described, the vendors are to be protected; if there should turn out to be none, no such words as these are to be inserted in the conveyance.

It is not right that the Defendant's deed should be incumbered

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with a reference to possibilities which are not shewn by the Plaintiffs to exist, and are asserted by the Defendant not to exist. Such a reservation will prejudice the title, and lead to useless inquiries and needless expense.

Judgment.

BACON, V.C.:—

I think this is a plain case. It is by no means a case which is to be regulated by what is called conveyancing practice. Here is a plain, positive contract, in terms which cannot be misunderstood. Trustees have to sell property. They execute their trust by putting it up for auction. In order to protect themselves against all claims for compensation, or any other claim which may arise, knowing no more of the subject than trustees may be expected to know, they protect themselves by a condition in the particulars of sale, which is in these terms:—[His Lordship read the words, and continued:—] Is not that a part of the contract? Is not that the substance of the contract? It is a sale of cottages, subject to any quit rents, or other rents, and the vendors take care specifically to mention that reservation by putting it into the conditions of sale. The conveyance can only carry into effect those conditions. The contract says that the conditions shall be observed. The purchaser at the sale fancies that if the words proposed appear upon his conveyance it may be inconvenient to him, and the vendors, who have a certain respect for that scruple, whether well founded or not, say, "Very well, we will relieve you from any accident of that kind." They do not say what they might have said, "We sold with these conditions; if you want hereafter to sell, you must put in a similar condition. We have found no difficulty in selling, and you will find no difficulty in selling." Without going into any reasoning of that kind, they say, "If you will sign a letter to say that notwithstanding the omission of that condition from your conveyance, you will still not pretend that we have ever waived the condition, then we will sign the conveyance in any way which you think fit." A fairer offer cannot be conceived. They were not obliged, that I know of, to make it. They did make it, and I suppose they will not now withdraw from it. Suppose the conveyance executed without the insertion of these words, it would then be a conveyance absolutely, simply, without qualification, of the premises. There is a covenant against incumbrances at the end.

The vendors, being trustees, covenant that they have done no act whereby they are prevented from granting and conveying all or any of the premises thereby granted or conveyed, or whereby any of the same premises may be impeached, charged, or incumbered, or prejudicially affected in any manner whatsoever. Having the protection of this condition, and with such contract as they had sold under, in my opinion they would have been imprudent if they had not, at least in the first instance, required that the substance and effect of the condition should be inserted in the conveyance.

Then it is suggested that the Defendant's solicitor is not justified in permitting the insertion on the ground that the purchaser may, on the occasion of another sale, suppress the fact that it was sold subject to the condition of sale which has been read. I think that is wholly without foundation. I do not think the Defendant would be under any liability, and the objection, founded upon any supposed liability, is a mere mistake if the solicitor does nothing to prevent his client when he puts the property up for sale inserting amongst the conditions one exactly similar to that under which he bought. The Defendant ought not to try to sell anything to which he is not entitled, and he ought not to ask to have conveyed to him anything which he has not bought and paid for.

I am of opinion that the contract is, in the plainest possible terms, consistent with the subject to which it applies, that the condition cannot be called a trick or a trap, or anything which is in the slightest degree calculated to mislead the purchaser, and that the vendor is entitled to that which he asks for by this action, namely, an order for the specific performance of the contract, and payment of the purchase-money.

The following are minutes of the order:—

Order specific performance on the footing of the title having been accepted by the Defendant; that the words objected to by the Defendant should be inserted in the conveyance, or that he should sign a letter in the form set out in the 3rd paragraph of the reply. Interest to run from the day of completion according to contract; Defendant to pay the costs of the action.

Solicitors: *Lake, Beaumont, & Lake; E. Woodard.*

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In re PEPPITT'S ESTATE.
CHESTER *v.* PHILLIPS.

[1876 P. 242.]

Practice—Representation of Heir-at-law, Next of Kin, or Class, before Determination of Question of Construction—Rules of Court, 26th June, 1876, Order XVI., r. 9a.

Where upon the construction of a will questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, the Court made an order under the Rules of 26th of June, 1876, Order XVI., rule 9a, appointing persons to represent the various classes of representatives of which some or one might be held to be entitled, before the questions of construction came on to be decided.

Statement.

MOTION FOR JUDGMENT.

William Peppitt, who died on the 12th of May, 1850, by his will, dated the 28th of April preceding, gave to his wife *Sarah* all his personal effects and estate of whatsoever kind for life, and "after her decease, my personal estate and effects to be divided amongst my heirs and to their children, with *Henry Richard Powell*, to be share and share alike." He further made his wife *Sarah* his sole executrix.

Sarah Peppitt, the widow, proved the will, got in the personal estate, which was considerable, and paid the debts. In 1854 she married *William Henry Gregg*, and on the 20th of March, 1876, she died intestate.

The writ was issued on the 22nd of November, 1876, by a son of one of the testator's sisters, who had taken out administration *de bonis non* with the will annexed, against two other children of the same sister, for administration; and the claim stated as above, and that the testator never had any children, and had two brothers and three sisters, all of whom died in the lifetime of the tenant for life, several having left children, and that *Henry Richard Powell* had gone abroad in 1848, and the Plaintiff did not know whether he was living or dead.

From the evidence in support it appeared that of the testator's two brothers nothing had been heard for more than forty years.

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One was believed to have had children, but none could be found, and no answer had been received to advertisements. All the next of kin of the testator at his death were believed to be dead.

H. Burton Buckley, for the Plaintiff:—

Two questions arise on the construction of this will: one whether by the word "heirs" are meant heirs or next of kin; the other whether the word "children" is a word of limitation, or imports a substantive gift to the children mentioned.

Great saving of labour and expense will be effected if a decision can be obtained upon the construction of the will before any attempt is made to find the heir, an undertaking which may be wholly useless, if it should be held that the next of kin are entitled.

The Court is asked, therefore, under Order XVI., rule 9a, of Rules of Court of 26th of June, 1876, to make an order appointing persons to represent the various classes interested, before deciding what construction is to be put on the will.

Housley, for the Defendants, did not oppose.

BACON, V.C., made an order of which the following are minutes:—

Order an inquiry whether any of the next of kin of the testator at the time of his death died before the 20th March, 1876, and if so, whether any of such next of kin left any child or children them respectively surviving who died before the said 20th March, 1876, and any such child or children who survived that date.

And in case it shall appear that any of the said next of kin so dying left any such child or children who died before the said 20th March, 1876, order a proper person to be appointed in Chambers to represent such child or children so dying for the purpose of obtaining the judgment of the Court upon the construction of the will.

And in case it shall appear that any of the said next of kin so dying left any such child or children who survived that date, order one of the said last-mentioned children if any are still living, and if they are all dead then that a proper person be appointed in Chambers, to represent such last-mentioned children for the purpose aforesaid.

An inquiry whether *Henry Richard Powell* is living or dead, and if dead, whether or not he survived the testator.

And in case he survived the testator, an inquiry who is his legal personal representative; and if it shall appear that he survived the testator and has no

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legal personal representative, order a proper person to be appointed in Chambers to represent his estate for the purposes of this action.

Order that proper persons be appointed in Chambers to represent, for the purpose of obtaining the judgment of the Court on the construction of the will, the following persons and classes respectively, that is to say, 1. The persons who were at the death of the testator his next of kin according to the statutes for the distribution of intestates' estates. 2. The heir-at-law of the testator at the time of his death. 3. The children (if any) of the said heir-at-law who died before the 20th March, 1876. 4. The children (if any) of the said heir-at-law who survived the 20th March, 1876.

Order that after such inquiries have been made and persons appointed the Chief Clerk do certify in respect of the matters aforesaid independently of and without waiting for the completion of his certificate in respect of the inquiries hereinafter directed.

And the Plaintiff, the administrator *de bonis non* of the estate and effects of the said testator with the will annexed, by his counsel submitting to account, order the following accounts and further inquiries to be taken and made, that is to say:—

[Then followed the accounts and inquiries usual in an administration decree, with adjournment of further consideration, and liberty to apply.]

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Solicitor: *R. T. Jarvis.*

V.-C. H. 1876 Nov. 20.

AUSTIN *v.* AUSTIN.

[1874 A. 78.]

AUSTIN *v.* BOYCE.

[1874 A. 117.]

Will—Construction—Trustees—Direction to pay Income for Maintenance and Support of Son's Wife—Separate Estate—Marital Right of Second Husband.

Testator gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a certain portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children, or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the decease of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—

Held, that the trustees had a discretion to pay the wife the income for her separate use.

Statement.

THOMAS BOYCE (whose daughter-in-law, *Eleanor Austin*, the Plaintiff in the suit [1874 A. 78], intermarried with *S. C. Boyce*), by will, in March, 1843, after giving his property to trustees in trust for sale, and directing them to pay four-tenths of the annual produce unto his wife for life, said that they should, during the life of his son, *S. C. Boyce*, "pay, apply, and dispose" of the annual produce of one sixth-tenth "for the maintenance and support" of his said son and his present or any future wife, and "the maintenance, education, and support of all and every or any of his children and child who being a son or sons shall be under the age of twenty-one years, or being a daughter or daughters shall be under that age and unmarried, or any or either of them, my said

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son and his wife and children, in such manner and such parts, shares, and proportions as" his trustees should in their "discretion think fit and proper, and without being answerable or accountable to any person or persons whomsoever for the way in which" they should apply the same annual income; and, after the decease of his son, should "pay and apply" the annual proceeds "in like manner unto and for the benefit of any widow whom he shall leave for her life, and any such child or children as aforesaid, being a son or sons, until he or they shall attain the age of twenty-one, or being a daughter or daughters shall attain that age or marry;" and subject to those trusts, in trust for all the children of *S. C. Boyce* who being a son should attain the age of twenty-one years, or being a daughter should attain that age or marry, equally as tenants in common. By a codicil made in 1845, one-fifth of another one sixth-tenth, which had been given to a daughter, who had died, became subject to the trusts above mentioned. The testator died in 1847, and his widow had since died. *S. C. Boyce* died in August, 1849, leaving his wife and six children, the youngest of whom attained twenty-one in 1870, surviving. In May, 1851, the widow married the Defendant in the suit [1874 A. 78], and the Plaintiff in the suit [1874 A. 117]. On that marriage a settlement was executed, and certain funds were settled upon the wife for her separate use; but the settlement did not comprise the two shares above-mentioned, it being considered (as alleged) that such shares already formed part of the wife's separate estate by force of the will of *Thomas Boyce*. The trustees of that will after the second marriage continued to pay the interest on the shares to the wife, on the footing of its forming part of her separate estate, and on her separate receipt. Disputes arose between the husband and wife, and they had for many years lived apart. The trustees of the will had continued to pay the income, which, it was alleged, she had become entitled to, and which amounted to about £430 a year, to the wife, as above mentioned. As the husband claimed to be entitled to this income, the wife filed her bill, and prayed for a declaration that the trustees had under the will a discretion to pay her the income for her separate use, and that all the payments had been rightly made by them; and for consequential relief. The Plaintiff, the husband, in the suit

[1874 A. 117] prayed for a declaration that he, on the youngest child of *S. C. Boyce* attaining the age of twenty-one, was entitled to the income; and for accounts; and for an order on the trustees to pay him what should be found due.

Hastings, Q.C., and *E. Cutler*, for the wife:—

Upon the true construction of this will, it is submitted that in substance this property was settled for the separate use of the wife; or, if it should be held that it was not, then it is submitted that power was given to the trustees so to pay and apply the income, that when it reached the wife's hands it was her own for her separate use. The husband's alleged right did not arise until the income reached the wife's hands, and when it had done so it was her separate property. Though the words "separate use" do not occur in this clause of the will, still, if it can be gathered from the language of the testator that the intention was that the trustees should be sufficiently discharged by the receipt of the wife alone, and that the receipt of the husband was excluded, that would be the creation of separate estate. The trustees were to pay the income for the maintenance and support of the son and his wife, and, after the son's decease, "unto and for the benefit of any widow whom he should leave, for her life;" and, reading all the language together, there is, it is submitted, no right in any person but the wife to this income, and the decisions in the cases of *Alexander* v. *Alexander* (1), *Maddison* v. *Andrew* (2), and *Crompe* v. *Barrow* (3), shew that the trustees have had ample authority to do what they have done.

W. Pearson, Q.C., and *Everitt*, for the trustees, supported the wife's contention, that the income had been, under the power vested in them, rightly paid to her for her separate use, and that they were not liable to any person for having exercised their discretion by paying the income to her for her separate use. They referred to *Tyrrell* v. *Hope* (4), *Darley* v. *Darley* (5), *Cape* v. *Cape* (6), and *In re Tarsey's Trusts* (7).

(1) 2 Ves. Sen. 640.
(2) 1 Ibid. 57, 60.
(3) 4 Ves. 681.
(4) 2 Atk. 558.
(5) 3 Ibid. 399.
(6) 2 Y. & C. Ex. 543.
(7) Law Rep. 1 Eq. 561.

V.-C. H.

1876

AUSTIN v. AUSTIN.

AUSTIN v. BOYCE.

Argument.

Dickinson, Q.C., and *Cooper Willis*, for the husband:—

It is impossible to support the contention on the two points raised on behalf of the wife. The trust was for the maintenance, education, and support of the son and his wife and children, and after the decease of the son it was a simple trust "for the benefit" of the widow, but not for her separate use. The cases which have been referred to have no application to this one. No words in reference to separate use have been inserted in the will, and the words "the receipt of a married woman shall be a sufficient discharge," even if used, would not create separate estate, nor would the word "sole": *Gilbert* v. *Lewis* (1); *Massy* v. *Rowen* (2). This was a trust for the maintenance and support of the wife and children, and when the children had attained twenty-one, or if daughters, married; it was a simple trust for the wife for life, but not for her separate use.

Judgment.

HALL, V.C.:—

I am of opinion that this will gives the trustees a discretion to pay the wife the income for her separate use; but quite irrespective of that, what is the true construction of this will? Though the words "maintenance and support" will not, in an ordinary case, be sufficient to create a separate use in this case, they must not be lost sight of, or considered as being without signification. They have reference to the persons named, and here they are for the maintenance and support and benefit of a married woman, as distinguished from the marital right of the husband to income which would go into his pocket. But I am, in this case, not compelled to give any particular meaning to these words. The first direction of the testator to the trustees was "to pay, apply, and dispose" of the produce "for the maintenance and support" of his son and his present or any future wife and children in such manner as they in their discretion should think fit and proper, and it appears to me that, independently of any authority, it was perfectly competent to the trustees, in performing that trust, to decide in what manner they should maintain and support the wife, and whether they should pay all or any part into her hands for

(1) 1 D. J. & S. 38. (2) Law Rep. 4 H. L. 288.

her separate use. Circumstances might well arise in which they would think that the only fit and proper way of discharging their duty to the wife would be to pay the income to her for her separate use. The trustees had certainly a discretion given to them during the lifetime of the testator's son. And after the decease of the son provision was made shewing what the trustees were to do. They were to "pay and apply" the annual proceeds "in like manner unto and for the benefit of any widow whom he should leave, for her life" and the children. It has been contended that the discretion of the trustees, so far as they had any, was confined to the period of minority of the children, but I can see no ground for that argument. There was a discretion given to the trustees under the first trust to pay the wife what money they should think fit and proper for her, and under the subsequent trust to pay her moneys in like manner for her benefit if and when she should become a widow. The same discretion and power were continued to them; and, in my opinion, the true construction of the will is, that the wife, after her second marriage, was entitled, when the moneys were paid over to her, to consider that they were paid to her for her separate use, and to be applied by her for her maintenance and support, and that they were not paid into her hands simply for the purpose of paying them over to her second husband.

The declaration will be as prayed by the wife. The bill by the husband must be dismissed with costs.

Solicitors: *D. E. Forbes; Torr & Co.*, agents for *Osborne, Ward, & Co., Bristol; Chorley & Crawford.*

V.-C. H.
1876
Nov. 25.

In re BOND.
COLE *v.* HAWES.

[1876 C. 274.]

Will—Construction—Precatory Trust—Bequest to Wife—"To do justice" to Testator's "Relations."

Ch D. 226.

A testator bequeathed all his furniture, &c., and other property to his wife, and for her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who" she "may please":—

Held, on demurrer, that no precatory trust was created.

Statement.

J. S. BOND, by his will, made in January, 1862, after making numerous bequests, said, "I further bequeath to my dear wife, *Ann Bond*, all my furniture, plate, books, linen, and all other property of every description from this date up to the day of my decease, except the property that is otherwise named and stated, and for my dear wife, *Ann Bond*, to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please." The testator died in May, 1872, and *Ann Bond* died in 1875.

A question arose whether this bequest gave an absolute interest to *Ann Bond*, or constituted a precatory trust. The Plaintiffs, some of the testator's next of kin, in their statement of claim submitted that there was a trust, and the Defendants demurred.

Argument.

W. Pearson, Q.C., and *Shebbeare*, in support of the demurrer:—

The Plaintiffs have to make out to the satisfaction of the Court that there was an imperative duty thrown upon Mrs. *Bond* to give the whole of the testator's property to some one or more of his relations; but that, it is submitted, they cannot do. The objects are not sufficiently or clearly indicated; nor is the subject-matter indicated, nor was there any actual trust imposed upon

the wife. The testator's words shew that he left her quite unfettered as to the distribution of the property which he bequeathed to her.

[They referred to *Bernard* v. *Minshull* (1).]

Dickinson, Q.C., and *Maclean*, for the Plaintiffs :— Argument.

This case is governed by the decision in *Curnick* v. *Tucker* (2). They cannot be distinguished. There is in this will no uncertainty at all. There is a trustee; trust property and *cestuis que trust*. These are all certainly ascertainable. There is no doubt as to the property, nor is there any as to the objects. They are relations on his side. Why should the testator have referred to them if his intention was not to provide something for them? Could he have intended that his wife should give his property to total strangers to him? The three ingredients essentially necessary in these cases being here pointed out and certain, this demurrer should be, as in *Le Marchant* v. *Le Marchant* (3), overruled.

[They also referred to *Harding* v. *Glyn* (4) and *Tudor's* Leading Cases in Equity (5).]

HALL, V.C.:— Judgment.

I am of opinion that the testator did not by his will constitute a trust. The case of *Harding* v. *Glyn* is in some respects in point, but it covers only a part of the language in this case. The testator's relations here were to be such as his wife should think "worthy of remuneration." They were merely pointed out. In *Harding* v. *Glyn* there was not that which exists in this case—that which clearly shews that nothing could take effect until his wife's death. Everything was left to her, and it was at her option to do what she pleased with it; but if a trust was constituted, I must hold that it was so from the death of the testator, and the effect of that would be to say that the wife had nothing to give away. In

(1) Joh. 276, 285. (3) Law Rep. 18 Eq. 414.
(2) Law Rep. 17 Eq. 320. (4) 1 Atk. 469; S. C. 5 Ves. 501.
(5) 3rd Ed. vol. ii. p. 860.

V.-C. H. 1876 *In re* BOND. COLE *v.* HAWES.

this will there was a power clearly created which enabled the wife to withhold everything from those persons who were the testator's relations. She was not to be under any obligation or restriction in regard to the disposition of any part of his property, but she was to be "quite at liberty to give and distribute what and to whom" she might please. There is clearly an uncertainty as to the quantity she was to give the relations. It being a case in which I cannot declare that a trust was constituted, I must allow the demurrer, and with costs.

Solicitors: *A. T. Hewitt; Winter, Williams, & Co.*

In re BOULTER.
Ex parte NATIONAL PROVINCIAL BANK OF ENGLAND.

C. J. B.
1876
Nov. 20.

Deed—Misdescription of Property—Latent Ambiguity—Falsa Demonstratio—Parol Evidence—Statute of Frauds.

By an instrument under seal dated the 2nd of November, a customer gave to his bankers a charge on the premises mentioned in the schedule as a security for all moneys then due or thereafter to become due from him to them, subject to a prior mortgage of the 3rd of October to a building society, and he covenanted to execute a legal mortgage when required. The schedule described the property as "three leasehold houses in *Coity* held by the mortgagor under a lease of the 25th of September." The lease of the 25th of September in fact comprised only one house. There was evidence that on the 2nd of November the bankers agreed to make further advances to the customer, upon his giving them satisfactory security; that he then offered to give them a charge upon three leasehold houses, which he pointed out to the manager; that the manager agreed to accept those three houses as security; and that the deed of charge was then drawn up at the bank, the description in the schedule being inserted from the customer's instructions. One only of the three houses thus pointed out was comprised in the lease of the 25th of September, and the two others were comprised in a lease of the 31st of December, which, as well as the lease of the 25th of September, was subject to a prior mortgage to the building society:—

Held, that this evidence was admissible, and that the bankers were entitled to a charge on the two houses comprised in the lease of the 31st of December.

Statement.

THIS was an appeal from a decision of the Judge of the *Cardiff* County Court.

W. H. Boulter, a builder at *Bridgend*, filed a liquidation petition on the 21st of December, 1875, under which *D. T. Alexander* was appointed trustee.

Boulter was the lessee of a number of houses.

By a lease dated the 25th of September, 1874, one house in *Coity Road, Bridgend*, was demised to *Boulter* by *Henry Lewis* for a term of ninety-nine years.

By a deed dated the 3rd of October, 1874, *Boulter* mortgaged this lease to the *Maesteg Permanent Benefit Building Society*.

On the 27th of January, 1875, *Boulter* assigned the equity of redemption of this lease to *R. Lewis*.

By a lease dated the 31st of December, 1874, two houses in

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Statement.

Meadow Street were demised to *Boulter* by *H. Lewis* for a term of ninety-nine years.

By a deed dated the 2nd of January, 1875, *Boulter* mortgaged this lease to the building society.

By a second lease dated the 31st of December, 1874, two houses in *Coity Road* were demised to *Boulter* by *H. Lewis* for a term of ninety-nine years.

By a deed dated the 14th of January, 1875, *Boulter* mortgaged this lease to the building society.

By a lease dated the 13th of May, 1875, one house in *Coity Road* was demised to *Boulter* by *H. Lewis* for a term of ninety-nine years.

By a deed dated the 18th of May, 1875, *Boulter* mortgaged this lease to the building society.

By a lease dated the 1st of May, 1875, thirteen houses in *Quarella Road* were demised to *Boulter* by *M. B. Williams* and others for a term of ninety-nine years.

By a deed dated the 15th of May, 1875, *Boulter* mortgaged this lease to the building society.

On the 29th of October, 1875, *Boulter* by an instrument under seal charged and assigned to his bankers, the *National Provincial Bank of England*, the thirteen houses in *Quarella Road*, as a security for all moneys which might be then due, or which might thereafter become due from time to time by him to the bank, subject to the mortgage to the building society. And he thereby covenanted with the bank to execute to them when called upon a legal mortgage of the premises. And it was agreed that this security should be held by the bank without prejudice to any other security or securities which they might then or thereafter hold on his account.

On the 2nd of November, 1875, *Boulter* by a similar instrument under seal charged and assigned to the bank all and every the premises mentioned in the schedule at the foot thereof as a security for all moneys which might be then due, or might thereafter become due from time to time from him to the bank, "subject to a certain indenture of mortgage, dated the 3rd of October, 1874, from me to the *Maesteg Permanent Benefit Building Society*," and he covenanted with the bank to execute to them when called upon

a legal mortgage of the premises; and it was agreed that this security should be held by the bank without prejudice to any other security or securities which they might then or thereafter hold on his account.

The schedule to this instrument was as follows:—"Three leasehold dwelling-houses in the parish of *Coity* and county of *Glamorgan*, held by the said *W. H. Boulter* by a certain indenture of lease, dated the 25th of September, 1874, and expressed to be made between *Henry Lewis* of the one part, and the within-named *W. H. Boulter* of the other part."

On the 14th of November, 1875, the bank gave notice to the building society of their two charges, claiming by their notice a charge upon "the sixteen leasehold dwelling-houses situate in the parish of *Coity* now in mortgage to you."

On the 16th of March, 1876, the trustee in the liquidation sold the two houses comprised in the second lease of the 31st of December, 1874, for £1085, and the thirteen houses comprised in the lease of the 1st of May, 1875, for £1200. The amount due to the building society upon their mortgages of these two leases was £1846, leaving a balance of £439. The amount due from *Boulter* to the bank was £351. The bank claimed to be entitled to a charge upon the two houses comprised in the second lease of the 31st of December, 1874, and evidence was adduced which shewed that on the 2nd of November, 1875, the manager of the bank agreed to make further advances to *Boulter* upon his giving satisfactory security, and that *Boulter* then went with the manager to three houses in *Coity Road*, one of which was the house comprised in the lease of the 25th of September, 1874, and the others were the two houses comprised in the second lease of the 31st of December, 1874, and pointed them out to him, and offered to give the bank security on all those three houses, subject to a prior mortgage to the building society. The manager accepted this security as satisfactory, and the parties then returned to the bank, where the deed of charge was drawn up and executed. The description in the schedule was inserted from *Boulter's* directions. This account of what happened was given by both *Boulter* and the manager of the bank.

The trustee applied to the County Court for directions as to the

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disposal of the balance of £439. The Judge was of opinion that parol evidence could not be admitted to vary the written instrument of the 2nd of November, 1875, and he made an order declaring that that instrument created no charge upon the two houses comprised in the second lease of the 31st of December, 1874.

The bank appealed.

J. G. Wood, for the Appellants:—

This is a case of a latent ambiguity and parol evidence is admissible to explain it. The instrument of the 2nd of November cannot be entirely disregarded; effect ought to be given to it according to the intention of the parties. It is an informal document, not drawn by a lawyer; it is only a contract to give a legal mortgage in a more formal way. The *Statute of Frauds* has no application.

In *McMurray* v. *Spicer* (1) parol evidence was admitted to explain an ambiguity in the description of property comprised in a contract for sale, and specific performance was then enforced.

In *Ogilvie* v. *Foljambe* (2) it was held that parol evidence is admissible to explain the subject-matter of an agreement.

[He referred also to *Taylor* on Evidence (3).]

Little, Q.C., and *Romer*, for the trustee:—

The instrument is a deed creating an actual charge; not merely a contract to give a charge. The description of the property in the schedule is clear; it is the property comprised in a specified lease. It must be read as if the parcels of the lease were set out in the schedule. There is, moreover, the reference to the mortgage of the 3rd of October. The *Statute of Frauds* requires that there should be a contract in writing to charge land. Where is there a contract in writing to charge anything but that which is comprised in the lease of the 25th of September? There is no authority for admitting parol evidence to contradict the description in a deed, or to substitute other parcels for those which are contained in it: *Taylor* on Evidence (4); *Potter* v. *Duffield* (5).

(1) Law Rep. 5 Eq. 527.
(2) 3 Mer. 53.
(3) 6th Ed. pl. 1105, 1109.
(4) Ibid. pl. 1104.
(5) Law Rep. 18 Eq. 4

Parol evidence can only be admitted to explain the meaning. But here there is a perfectly clear description of the property. This is an attempt to manufacture a contract in defiance of the *Statute of Frauds*. The cases upon settlements stand on a different footing. There the consideration has been given, and the terms of the contract must be ascertained. The payment of purchase-money is a different matter; an action could be brought to recover it, and in bankruptcy the right of proof is substituted for the right of action. It is quite conceivable that the debtor may have intended to mislead the bankers by charging only one house when they supposed that he was charging three.

Judgment.

BACON, C.J.:—

In my opinion the whole of the Respondent's argument has proceeded on an entirely erroneous principle. The *Statute of Frauds* has, in my judgment, no more to do with this case than has *Magna Charta*. The contract is plainly proved between these people. It is a contract for advancing money, and it is plainly proved that there was a contract for a security upon certain property. That property was pointed out to and examined by the bank manager, and the parties then returned to the bank to prepare a written memorandum in order that the *Statute of Frauds* should be complied with. Taking the debtor's own description of the three houses, he promised a mortgage on the faith of which the advance was made to him. It is now said that that description was erroneous. In this Court of Bankruptcy, which is as much a Court of Equity as any other Court of Equity, can it be doubted that if this man had not been insolvent the bank might have had the contract rectified? On the evidence before me it is impossible to doubt that they could, for lender and borrower agree that the facts are those which I have thus shortly described. To talk about latent or patent ambiguities is wholly unnecessary. The mortgaged property, subject to a previous mortgage to the building society, is sold and all the proceeds realized. It appears that the proceeds are enough to satisfy the first mortgage to the building society, and to leave a surplus sufficient to satisfy the debt due to the bank, which is undisputed. Under these circumstances, and in this view of the law, I have no doubt that the Appellants would have been entitled in a Court of Equity to have the contract rectified, which, in itself, does comply

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with the *Statute of Frauds*, for it does describe the contract between the parties. The contract is duly executed, and the only failure is that the borrower has furnished this erroneous, or partially erroneous description. There is no error in the description of three houses. He pointed out the houses, and the manager could see them with his eyes and touch them with his fingers. I have no doubt whatever that the bank have a right to have the contract rectified, and they are entitled to the £351, which it is not disputed is due to them, and which the proceeds of sale, after satisfying the building society's charge, are sufficient to pay.

Solicitors for Bank: *J. G. Hepburn & Sons*, agents for *T. T. Lewis, Bridgend.*

Solicitors for Trustee: *Torr & Co.*, agents for *Griffith & Corbett, Cardiff.*

Explained. Re MEADE (A DEBTOR). [1951] 2 All E.R. 168.

C. J. B. 1876 *Nov.* 27; *Dec.* 4.

In re BEALE. *Ex parte* CORBRIDGE.

Proof—Loan of Money to Trader to be employed in his Business—Borrower to be Trustee for Lender—Subsequent Bankruptcy of Borrower.

B., a trader, in 1857 went through the ceremony of marriage with *M.*, a sister of his deceased wife, and thenceforth lived with her as his wife. In 1858 a sum of £2000, which came to her under the will of her father, was by her direction paid to *B.*, to be employed by him in his business, it being at the same time agreed that *B.* should be a trustee of the £2000 for *M.*, and that a settlement should be executed to carry out the agreement. In 1876 *B.* filed a liquidation petition. No settlement of the £2000 had been executed:—

Held, that *M.* was not entitled to prove in the liquidation for the £2000 in competition with the creditors of the business.

Statement.

THIS was an appeal from a decision of the Judge of the *Sheffield* County Court.

John Beale, a wine merchant at *Sheffield*, filed a liquidation petition in 1876, under which *Cooper Corbridge* was appointed trustee. In July, 1857, *Beale* had gone through the ceremony of marriage with *Mary Walker*, a sister of his then deceased wife, and had after that lived with her as his wife. On the 1st of August, 1876, *Mary Walker* tendered to the trustee a proof for £3000 "for money lent, advanced, and paid" by her to *Beale*, at his request, in the year 1858. The trustee rejected the proof,

C. J. B. 1876 *In re* BEALE. *Ex parte* COBBRIDGE.

and *Mary Walker* applied to the County Court for an order to admit it. In support of her application she filed an affidavit, in which she stated that in August, 1858, a legacy of £3000, to which she was entitled under the will of her father, who had died in March, 1858, was paid by her direction to *Beale*. The payment was made to him in pursuance of and in reliance upon an agreement made between *Beale* and herself, after her father's death and prior to the payment to *Beale*, that the legacy should be advanced to and used by *Beale* in the business of a wine and spirit merchant which he then carried on; but that as to £2000, part thereof, he should be a trustee of it for *Mary Walker*, and that a settlement to carry out the agreement should be executed by him after the receipt of the £3000. In fact, no settlement was ever executed. *Beale* made an affidavit to the same effect. The story was also confirmed by the evidence of *Henry Walker*, a brother of *Mary Walker*. The only evidence in opposition was that of the trustee, who said that, though he was appointed receiver and manager of the business of *Beale* immediately after he filed his petition, and assisted him in preparing his accounts for presentation to the first meeting of the creditors, yet nothing was said to him about the claim of *Mary Walker* until after the first meeting. The Judge admitted the proof to the extent of £2000. The trustee appealed.

Statement.

Argument.

Winslow, Q.C., and *C. Gould*, for the Appellant:—

We say that the alleged trust is an after-thought to evade the *Statute of Limitations*. But even if the alleged agreement was really made, there is no right of proof, for there has been no breach of trust. The money was employed in the business, as the Respondent intended. She might have had a right to follow the money if she could have found it *in specie*, but that is all; there is no right of proof: *Ex parte Butterfield* (1); *In re Childs* (2). If the money was merely lent, the debt is barred by the *Statute of Limitations*; there was no covenant to repay it.

De Gex, Q.C., and *Finlay Knight*, for *Mary Walker*:—

The evidence in favour of the trust is uncontradicted, and the transaction was a perfectly natural one. There is nothing incon-

(1) De G. 570. (2) Law Rep. 9 Ch. 508.

C. J. B. 1876 *In re* BEALE. *Ex parte* CORBRIDGE. Argument.

sistent in a man's being a trustee of a debt due from himself. There is no authority for saying that a debt of which a bankrupt was a trustee cannot be proved in his bankruptcy unless there has been a breach of trust. The decision in *Ex parte Butterfield* (1) turned upon whether there had been a breach of trust, because the question was whether the testator's estate could prove in competition with his own creditors, in accordance with the principle of *Ex parte Garland* (2). If the testator in *Ex parte Butterfield* had directed his money to be lent to another person to be employed in his business, and had declared a trust of it also, there would have been no objection to a proof for the loan in that person's bankruptcy. *In re Childs* (3) has no application.

Judgment.

BACON, C.J.:—

It cannot be denied that this is a very singular case, but the circumstances furnish an explanation of the origin of the transaction. The Respondent and the debtor were, to all intents and purposes, married, except for the provisions of the law of *England.* He being engaged in business, she, as any good wife would have done, allowed him to have her money to employ in his business. Stopping there, what was there wrong in the transaction? Was not the money exposed to all the hazards of the business? Had not the creditors of the business a right to say that they were entitled to be paid out of the assets in priority to the lender of the money which had been employed in the business? That is the principle of the decisions in *Ex parte Garland, Ex parte Butterfield,* and *In re Childs.* The trader goes into the world and deals with the money as part of his assets. It is said that a trust of it was created on behalf of the lender, but that is a trust repugnant to the first destination of the money. If there is a surplus after paying the creditors in full, *Mary Walker* may have a good equity against it, but that is her only right. In *Ex parte Butterfield* the proof was attempted to be made on behalf of the estate of a dead man; in the present case it is on behalf of a living woman: that is the only distinction. The trust set up is wholly repugnant to the original stipulation for the loan. Mr. *De Gex* says

(1) De G. 570. (2) 10 Ves. 110.
(3) Law Rep 9 Ch. 508.

that the case of *In re Childs* (1) has no application to the present case. I agree that it has no direct application, but it recognises the principle of *Ex parte Butterfield* (2) and *Ex parte Garland* (3). There a man had carried on two separate businesses, a share in one of which had belonged to his wife before he married her, and he had entered into a covenant that the profits of her share of that business should be for her separate use. The Lords Justices held that on his bankruptcy there must be a separate administration of the assets of the two businesses, and that if there was any surplus of the husband's share of that estate in which the wife was interested, it must go over to the other estate. The judgment of Lord Justice *James* is distinct. In my opinion the principle is plain. It is not said that *Mary Walker* participated directly in the profits of the business, but that the business was in a certain sense carried on for the joint benefit of herself and the debtor no one can doubt. The *Partnership Act* of 1868 is imperative that a person who lends money to a partnership, on an agreement that he is to receive a share of the profits, cannot call for payment of his money until after the creditors of the partnership have been paid in full. If that statute has any application to this case the result is plain. *Mary Walker* knew that the money was to be employed in the business, and if she had sued the debtor while he was solvent it would have been a sufficient answer for him to say, I have employed the money in my business, and I have lost it all; there is none of the £2000 left. The true principle is pointed out by *Ex parte Garland* and *Ex parte Butterfield;* no proof can be admitted in respect of a trust which is inconsistent with the application of the money which the lender has pointed out. The order of the County Court Judge must be discharged, but I think that, having regard to all the circumstances of the case, I ought not to give the Appellant any costs.

Solicitors for Trustee: *Torr & Co.*, agents for *Burdekin & Co., Sheffield.*

Solicitor for *Mary Walker: W. F. Watson*, agent for *Newton & Jones, East Retford.*

(1) Law Rep. 9 Ch. 508. (2) De G. 570.
(3) 10 Ves. 110.

C. J. B.
1876
Dec. 4.

In re PARRY.

Security given by Trustee—Enforcing Bond in Name of Chief Judge—Power of County Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 14, *sub-s.* 2—*Bankruptcy Forms*, 1870, *No.* 40.

A bond with sureties given by a trustee in a bankruptcy (according to Form No. 40 of the Bankruptcy Forms, 1870) to the Chief Judge, as security for the faithful discharge of the duties of his office, may be enforced by the order of a County Court.

Statement.

THE trustee in this bankruptcy had been required by the creditors to give, as security for the faithful discharge of the duties of his office, a bond (in the Form No. 40 of the Bankruptcy Forms, 1870), whereby he and a surety became bound in a penal sum to Sir *James Bacon*, the Chief Judge in Bankruptcy. The trustee having committed a default, it was desired to put the bond in suit against the surety, and application was made to the Judge of the *Bangor* County Court for leave to do this. His Honour thought that he had no power to make the order, but that the application ought to be made to the Chief Judge himself, and he gave the applicants leave to apply to him accordingly.

Bagley, for the applicants, stated the facts, and asked that the case might be placed in the paper for hearing.

Judgment.

BACON, C.J. :—

My name is inserted in the bond as a mere matter of form, and I think that the Judge of the County Court has ample power to order the bond to be put in suit. You had better communicate my opinion to him.

Solicitors: *Finney & Bruff*, agents for *Louis & O. Edwards, Ruthin.*

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[1875 H. 153.]

CRAVEN *v.* STANLEY.

[1875 C. 183.]

C. A.
1876
M. R.
March 13.
C. A.
Nov. 7, 11;
Dec. 3.

Will—Construction—Shifting Use—Eldest Son.

E. by his will, dated in 1814, devised real estate to *R.*, the second son of Sir *T. S.*, of *H.*, Baronet, for life, with remainder to *R.*'s first and other sons successively in tail male, with like remainders in favour of *J.* and *C.*, the third and fourth sons of Sir *T. S.*, and their sons, with an ultimate remainder to the testator's right heirs. The will contained a name and arms clause, and also a proviso that in case *R.*, *J.*, or *C.* should become the eldest son of Sir *T. S.*, the estate thereinbefore devised to him becoming the eldest son of Sir *T. S.*, and the remainder to his first and other sons, should cease, determine, and become void, as if he were actually dead without issue male of his body, and the real estate thereby devised should immediately go and remain to the use of such person or persons as by virtue of the devises thereinbefore contained would then be entitled as the person or persons next in remainder to the same estates, in case such person so becoming the eldest son of Sir *T. S.* were then dead without issue male of his body. Sir *T. S.* survived the testator. His eldest son died without issue in 1863. *R.*, who thereupon succeeded to the baronetcy, died without issue in 1875. *C.* died without issue in 1834:—

Held, by the Master of the Rolls, that as "eldest son" could not in this will mean the eldest born son, it must be taken to mean eldest surviving son for the time being—that *J.* had become the eldest son of Sir *T. S.* within the meaning of the will, and that the estate had devolved on the heir of the testator.

Held, by *James*, L.J., and *Baggallay*, J.A. (*dissentiente Bramwell*, J.A.), that "become the eldest son of *T. S.*" meant "become in the lifetime of Sir *T. S.* his eldest surviving son and heir apparent," and that the shifting clause had not taken effect.

Affirmed by H. of L. 2 App. Cas. 692.

Statement.

HENRY ERRINGTON, by his will, dated the 13th of January, 1814 (wherein he described himself as of *Sandoe*, in the county of *Northumberland*, and *Red Rice*, in the county of *Hants*), devised all his real estate in the county of *Northumberland* to Sir *John Courtney Throckmorton* and *Bernard Edward Howard*, and their heirs, to the several uses thereinafter limited, declared, and expressed of and concerning the same, being to the use of *Richard Fermor* for life, with remainder to the use of the said Sir *John*

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Throckmorton and *Bernard Edward Howard*, and their heirs (hereafter called the trustees), during the life of the said *Richard Fermor*, upon trust to preserve contingent remainders, with remainders to the use of the first and other sons of the said *Richard Fermor* successively in tail male, with remainder to the use of *Rowland Stanley* (described as "the second son of Sir *Thomas Stanley*, of *Hooton*, in the county palatine of *Chester*, Baronet") for life, with remainder to the use of the trustees during his life upon trust to support contingent remainders, with remainders to the use of the first and other sons of the said *Rowland Stanley* successively in tail male, with remainder to the use of *John Stanley*, the third son of the said Sir *Thomas Stanley*, for life, with remainder to the use of the trustees during his life upon trust to preserve contingent remainders, with remainders to the use of the first and other sons of the said *John Stanley* successively in tail male, with remainder to the use of *Charles Stanley*, the fourth son of the said Sir *Thomas Stanley*, for life, with remainder to the use of the trustees during his life upon trust to preserve contingent remainders, with remainders to the use of the first and other sons of the said *Charles Stanley* successively in tail male, with an ultimate remainder to the use of the testator's right heirs. And the will contained the following clauses:—

"And I do hereby require and direct that the said *Richard Fermor*, *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, and every other person who by virtue of the devises hereinbefore contained, or of this proviso, shall become entitled to the possession or the receipt of the rents and profits of the estates hereby devised, shall and do within the space of one year next after they shall respectively so become entitled to the possession or to the rents and profits of the said estates take upon him and them respectively, and use in all deeds, letters, and writings, the surname of *Errington* only, and use no other surname, and take and bear the arms of *Errington* only, and no other arms, and also shall and do within the space of one year next after they shall so respectively become entitled as aforesaid sue for, apply, and endeavour to obtain an Act of Parliament, or a proper license from the Crown, or take such other means as may be requisite or proper to enable him or them respectively to take and bear the said surname

and arms of *Errington* only. And I do hereby declare it to be my will, that in case any such person or persons shall refuse or neglect to take such surname and arms, and to take and use the ways and means which shall be requisite and proper to enable and authorize him and them so to do within the space of one year, then and in such case the devise hereinbefore contained of the said estates to the use of him or them so neglecting or refusing shall cease, determine, and become utterly void. And the said estates shall in such cases immediately thereupon go to the person next beneficially entitled in remainder under the devises hereinbefore contained, in the same manner as if the person or persons whose estates shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, and being tenant or tenants in tail, was or were dead without issue male. And I do hereby further declare my will to be that the cesser or determination of the estates of the said *Richard Fermor*, *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, by force of the last proviso, shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to their sons, but that the remainders limited to the said Sir *John Courtney Throckmorton* and *Bernard Edward Howard* and their heirs, as aforesaid, shall, after such cesser or determination, take effect and continue for preserving such contingent remainders and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life during the suspense and contingency of such then expectant remainder, the said Sir *John Courtney Throckmorton* and *Bernard Edward Howard*, their heirs and assigns, shall receive, pay, and apply the rents, issues, and profits of the said estates which would belong to such tenant for life if such cesser or determination had not taken place, unto the person or persons to whom the said rents, issues, and profits would have been payable under and by virtue of the devises hereinbefore contained, in case such tenant for life was actually dead, so that immediately after such cesser or determination the issue male of the said *Richard Fermor*, *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, entitled for the time being under the limitations aforesaid to the said estates in remainder immediately expectant on the decease of the said *R. Fermor*, *R. Stanley*,

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J. Stanley, and *Charles Stanley*, may be entitled to the rents, issues, and profits of the said estates, for his and their own proper use and benefit during the life of the parent as if such parent were dead, and that in case no such issue be in existence, then during the vacancy or contingency of such issue the person next entitled for the time being under the limitations or devises aforesaid to a vested remainder in the said estates expectant on the decease of the said *Richard Fermor* or *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, and failure of such issue male of their bodies, shall be entitled to the said rents, issues, and profits to his and their own proper use and benefit respectively, but without any exclusion of or prejudice to the estate, interest, or right of any such issue male afterwards coming into existence, but only from the time of the birth of such issue respectively. And I do hereby declare it to be my will, that in case the said *Rowland Stanley* or *John Stanley*, or *Charles Stanley* shall become the eldest son of the said Sir *Thomas Stanley*, then and in such case, and so often as the same shall happen, the estate hereinbefore devised to him becoming the eldest son of the said Sir *Thomas Stanley*, and the remainder to the first and other sons of his body, shall cease, determine, and become void, as if he were actually dead without issue male of his body, and then and thenceforth the estates hereby devised shall immediately go and remain to the use of such person or persons as by virtue of the devises hereinbefore contained would then be entitled as the person or persons next in remainder to the same estates, in case such person so becoming the eldest son of the said Sir *Thomas Stanley* was then dead without issue male of his or their body or bodies, and the same person or persons shall in every such case be entitled to take the same estate and estates in the said premises hereby devised as he or they would have been entitled to take therein by virtue of this my will, if such person so becoming the eldest son of the said Sir *Thomas Stanley* were actually dead without issue male as aforesaid."

And the testator bequeathed all his personal estate, subject to the payment of his debts and legacies, to his executors thereinafter named, their executors, administrators, and assigns, upon trust to get in and convert the same into money, and to invest the moneys

so to arise in the purchase of lands which were to be charged with certain life annuities, and subject thereto, and to powers of distress and entry and a term of years for securing payment thereof, were to be conveyed, settled, and assured, so that the same might, as near as the rules of law and equity would admit, go and remain to the same persons and for the same estates, and with, under, and subject to the same powers, provisoes, and declarations as were thereinbefore mentioned and contained of and concerning his estates in *Northumberland*. And he directed that in the meantime, until such purchase, his executors should apply the income of the residue of his personal estate in payment of the annuities thereinbefore given, and should pay the residue of such income to the person to whom the rents and profits of the lands so to be purchased would go or be payable in case such purchase and settlement had been actually made. And the testator appointed *William Cruise* and *William Throckmorton* executors of that his will.

The testator died in 1819. His residuary personal estate applicable for investment in the purchase of lands pursuant to the trusts of the will amounted to £139,852, and was some time previously to 1838 applied in the purchase of certain freehold and copyhold estates.

Richard Fermor died in the testator's lifetime without issue, and upon the testator's death *Rowland Stanley* entered into possession of the estates devised by the will.

Sir *Thomas Stanley* survived the testator, and died in August, 1841, having had four sons, viz., *William Thomas*, *Rowland*, *John Massey*, and *Charles*. His eldest son, *William Thomas Stanley*, succeeded him in the family title and estates, and died on the 29th of June, 1863, without having been married, and thereupon *Rowland Stanley*, in the said will named, who had duly assumed the name and arms of *Errington*, succeeded to the baronetcy. He died on the 31st of March, 1875, without issue male, and thereupon Sir *John Massey Stanley* (in the said will named *John Stanley*) succeeded to the baronetcy, and entered into possession of the estates devised by the will of the testator and purchased with his residuary estate.

Charles Stanley died without issue in 1834.

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These suits were instituted by persons claiming to be entitled to the estates devised and purchased as aforesaid under the ultimate limitation to the right heirs of the testator, with the object of obtaining declarations that they were so entitled, and consequential relief.

It appeared that Sir *John Massey Stanley* did not succeed to the *Stanley* family estates, Sir *Thomas Stanley* and his eldest son having alienated them.

The suits came on to be heard together before the Master of the Rolls on the 13th of March, 1876.

Argument.

Southgate, Q.C. (*Chitty*, Q.C., and *Bagot* with him), for the Plaintiff in the first suit, said that the question was, what was the meaning of becoming "the eldest son" of Sir *Thomas Stanley?* The contention of the Plaintiff was that on the death of Sir *William Thomas Stanley* in 1863, *Rowland Stanley* (then Sir *Rowland Errington*) became the eldest son of Sir *Thomas Stanley;* that thereupon Sir *John Massey Stanley*, by virtue of the limitations in the will, became entitled to the estates for life, subject to the provisions of the name and arms clause; that inasmuch as he did not comply with those provisions his estate determined at the expiration of one year from the time when he became entitled thereto; that thereupon the devised and purchased estates went over to the trustee for the time being for preserving contingent remainders; that on the death of Sir *Rowland Errington*, Sir *John Massey Stanley* became the eldest son of Sir *Thomas Stanley*, and that thereupon the devised and purchased estates went over to the Plaintiffs in the two suits, who (although they might be entitled thereto) did not ask for any account of back rents. Having cited the following cases, *In re Theed's Settlement* (1), *Lambarde* v. *Peach* (2), *Turton* v. *Lambarde* (3), *Wilbraham* v. *Scarisbrick* (4), and *Livesey* v. *Livesey* (5), he was stopped by the Court.

Davey, Q.C., *Badnall*, and *Smart*, for other parties in the same interest.

(1) 3 K. & J. 375.
(2) 4 Drew. 553.
(3) 1 D. F. & J. 495.
(4) 1 H. L. C. 167
(5) 2 H. L. C. 419.

Cotton, Q.C., *Fry*, Q.C., *Wolstenholme*, and *Kekewich*, for Sir *John Massey Stanley*:—

We contend that Sir *John Massey Stanley* has not become the "eldest son" of Sir *Thomas Stanley* within the meaning of the will. All provisoes which tend to defeat an estate must be construed strictly, and the Plaintiffs, in order to succeed, must shew that the event in which they are to succeed has really happened. It is admitted on all hands that the words "eldest son" cannot receive their literal meaning. We say that the clause by which the estates given to *Rowland*, *John*, and *Charles Stanley* are defeated on their respectively becoming "the eldest son" of Sir *Thomas Stanley* must be confined to their becoming such in the lifetime of their father, who was alive at the dates of the will and the testator's death. On any other construction neither *Rowland*, *John*, nor *Charles* (assuming them to die in the natural order) could ever retain the estates. If this be not so, we say that in order that the clause may take effect, the son must become not only the eldest surviving son, but there must be such survivorship as to carry with it the family estates of *Stanley* of *Hooton*; or that the eldership required must be heirship carrying the estates with it: *In re Bayley's Settlement* (1); *Collingwood* v. *Stanhope* (2). At all events, an "eldest" son must mean a son having at least two younger brothers, and Sir *John Massey Stanley* has now not even one.

Further, we say that even if Sir *Rowland Errington* became eldest son in 1863, Sir *John Massey Stanley* was not bound to take the name and arms within a year from that time. The name and arms clause applies only to persons becoming entitled under devises "hereinbefore contained," whereas the clause under which Sir *John Massey Stanley* became entitled in 1863 (if he did so) is contained in a subsequent portion of the will.

Finally, the gift over is to persons becoming entitled under the will. The Plaintiffs in these suits claim as or under the right heirs of the testator, that is to say, they claim as heirs and not under the will, and consequently the clause cannot enure for their benefit.

(1) Law Rep. 6 Ch. 590.

(2) Law Rep. 4 H. L. 43.

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Bagshawe, Q.C., for the trustees to support the contingent remainders.

JESSEL, M.R.:—

I have the satisfaction of knowing that this is an estate of considerable value, and therefore it is not likely that my decision, whatever it may be, will be acquiesced in, and it will not be for me to dispose finally of the property; but, entertaining, as I do, a very strong view as to the meaning of the words of this will, I see no reason for delaying my judgment, or doing otherwise now than stating what that view is.

I was pressed, first of all, with the argument that this being a limitation over by way of a springing use to deprive a person of what would otherwise be a vested estate, it must be construed strictly. I assent to that so far as this, that it must be construed strictly—whatever those words may mean—and I intend to construe it strictly, and it is only because I construe it strictly, and can only attach one meaning to it, construing it strictly, that I am going to give effect to it. Whether the word "strictly" means anything more or less than this, that the proviso must itself be clear in its terms, that is to say, unambiguous in its meaning, and capable, when fairly construed, of only one meaning, I do not say, but I do not think that it can be carried further than that.

Now, the first point that was urged upon me was as to the meaning of the proviso itself, and in order to ascertain its meaning we must look at the will. The will is the will of a gentleman who was maternally related to the children of Sir *Thomas Stanley*, of *Hooton*, and seems to have been their great great-uncle on the mother's side, and he not having any children of his own intended to benefit the younger children of Sir *Thomas Stanley*, who were his great great-nephews, or some such relations. There were three of them whom he knew sufficiently to be able to name in his will, and they seem to have been young children, the eldest being (as stated by counsel) something like four years old, and the youngest one year old. He gives his estates first to a nephew of his own, *Richard Fermor*, and it is only in default of the issue of *Richard Fermor* that he gives it to *Rowland Stanley*, who is described as the second son of Sir *Thomas Stanley*, of *Hooton*, in the county

palatine of *Chester*, Baronet. Then he gives it to his first and other sons in tail male, and then, in default of issue, to *John Stanley*, who is described as the third son, for life, with remainder to his first and other sons in tail male, and then to the issue of *Charles Stanley*, who was the next son, and who is so described in the will, and who at that time was the youngest son, and to his first and other sons in tail male, and in default of such issue, to his own right heirs for ever.

What has happened is this: the nephew, *Richard Fermor*, has died without leaving issue, *Rowland Stanley* has died without leaving issue, and I understand that *Charles Stanley* has also died without leaving issue, and the remaining one of those named in the will, namely, Sir *John Stanley*, is alive, but has no male issue, and the question that I have to decide is, whether, having regard to the two provisoes defeating the estates given by the devises which I have referred to, Sir *John Stanley* is deprived of the life estate which he would otherwise have taken in the testator's estate; and in that case, if there is no one else to take the property, the heir-at-law must take it, that is to say, the heir-at-law of the testator, or his representatives, who are the only other claimants. Now the proviso is this:—[His Lordship read the final proviso.] The other proviso in the name and arms clause is in similar terms, except that it says "that *Richard Fermor*, *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, and every other person who, by virtue of the devises hereinbefore contained, or of this proviso, shall become entitled to the possession," shall assume the name and arms of the testator. Upon that an argument has been founded with which I will deal presently.

Now, first of all, as regards the clause giving over the estate in case of the son becoming the eldest son. *Rowland Stanley* survived his father, Sir *Thomas Stanley*, and, after his father's death, succeeded to the baronetcy and became Sir *Rowland Errington*, having obtained the usual license to use the name and arms of *Errington*. In the year 1863 he became, as I understand the meaning of the words of this will, "the eldest son of Sir *Thomas Stanley*." It is said that the word "eldest" means the eldest born of one family. It may mean that when there is nothing else—perhaps it ought to mean that when there is nothing else; and

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probably, if one were considering the strictest possible use of language, the meaning of the words "eldest son" would be the one eldest born, whether he died immediately after his birth or not. It is true that where the eldest son when an infant dies, and the second son comes in, he is said to become the eldest; and so he does, for he takes the place of the eldest; and so also he does in another way, for he, being the next eldest in age, becomes the eldest surviving son, that is to say, the eldest in age. That, therefore, is another meaning which may be attributed to these words, and where the context shews that that must be the meaning, it is the strict meaning—that is to say, the word "eldest" means the eldest in age. In the other case of the eldest or first born son, it also means the eldest in age, because the first-born child must be the eldest in age; but where it cannot mean merely the first son, that is to say, first born, but the eldest of several sons, it must mean the eldest in age, and that must be its strict meaning. In other words, if you exclude the case of the eldest son born, then its strict meaning is the eldest of the other sons born. Now it appears to me in this case that this will excludes the idea of its meaning the eldest son born, because it notes the fact of the sons being the second, third, and fourth; and, therefore, when the proviso says that in case either the second, or third, or fourth son shall become the eldest son, it is impossible it can mean the eldest son born. Consequently, reading this proviso strictly, we see that that which may be the primary signification of the word is excluded, and then you come to the next, which is still equally a strict meaning, namely, the eldest in age. When you compare the words, and when you see two or three sons named together, it is impossible, as I said before, that the testator could have meant the eldest born son, because he must have known that by no possibility could a second or third or fourth son have become the eldest son, except by becoming the eldest in age by the death of those prior in age to himself.

But it does not stop there. I put in the words of description instead of the name, and then the proviso reads, "in case the second or third or fourth son shall become the eldest." It was said that, even assuming the term "eldest son" means the eldest in age, it means eldest with at least two younger sons behind,

because it is the superlative. I am not at all sure that that is so according to the strict meaning of the English language, but if it were so, I think it is an impossible meaning upon this proviso, because it says, "if the second or third or fourth son shall become an eldest son." How can a second or third or fourth son become an eldest son if the words mean only the eldest of three? Only in case you assume that the testator contemplated there would be at least two or three more sons born, and then why are you to attribute to him that assumption, and attribute to him at the same time that capricious disposition, that although those sons do not take anything the estate is to go over if he has had two more sons born, and that the estate is not to go over if he has not had any more sons born? I think it is entirely irrational to assume for the testator any such future birth of sons, and that he must be taken to have assumed that those were all the sons, being at liberty to make another will in the event of there being other sons born. On the other assumption, the scope of the will is hopelessly and utterly irrational, making the going over of the estate depend on the contingency of the birth of after-born sons who would take nothing. I am of opinion, therefore, that he has not used the word "eldest" in the sense of eldest of the three, but as the eldest in age of the living sons. That being so, and interpreting the words as strictly as I can, it appears to me that *Rowland* became the eldest son of Sir *Thomas*.

Then the point was made that he must become the eldest son in the lifetime of Sir *Thomas*. I must not, however, insert those words without some very good reason. As I was reminded by the learned counsel for Sir *John Stanley*, I must read the clause strictly. Reading it strictly, how can I insert the words "during the lifetime of Sir *Thomas Stanley*"? In a sense, he would never become the eldest son at all, except as the eldest son of a living person; but it would be most capricious to say that if he became the eldest son, although the prior son had left a son (a matter with which I will deal presently) born in the father's lifetime, he would lose the property, but if the event happened after the death, he would not lose the property. It seems to me impossible to say that you are at liberty to insert the words "during the lifetime." That being so, and reading the words strictly, the clause took effect upon

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the accession to the title of Sir *Rowland Errington* in 1863. But then it is said that there is another meaning to be given to the clause, and that is, another meaning is to be given to the words "eldest son" which the words do not bear either primarily or secondarily—that the event spoken of is, not becoming the eldest son at all, but it is, becoming the son entitled to the *Hooton* estate. Now, no doubt that will make a rational scheme for this will. It is rational to suppose that a man is to lose one estate when he owns or obtains another, but it is equally rational to suppose that a man who becomes an eldest son may be provided for by some other means. I cannot tell, and I do not know anything about it, but there may have been some provision for the case of a son becoming an eldest son at any time. I am not at liberty to deal with circumstances of that kind, or to make that will rational according to my notion of what is rational. I must look at this instrument strictly; and especially a clause of this kind must be construed strictly.

No doubt the Courts have at different times exercised a wise discretion in certain classes of cases as to controlling the primary meaning of such words "as elder" or "eldest, "younger" or "youngest." Those cases are commonly called "portion" cases, and in them the testator has been dealing with his estate and giving it to the eldest son, and providing a sum of money as portions for younger children, shewing an anxious desire to provide for all the children. When we have found a will so framed, it has been the habit of the Court to say that the meaning of the testator, although he has called those children the younger children, was that the younger children were not the younger in age, which was its proper meaning, but younger in this sense, that they did not take the estate, so that the eldest child, if a daughter, would take a portion, although in no sense, except in that which I have mentioned, would she be described as a younger child. It is putting, not the natural meaning, but a new meaning on the words by reason of the disposition of the property shewing an intention on the part of the testator to provide for all the children either of himself or of the person for whose family he provides. In the same way, where the estate is given to the second or younger son, it is possible (although that would of course more

seldom happen) even to include an elder son in the description of the class who take the portion. In all those cases, from the nature of the disposition, the Court has controlled the primary meaning of the words; here I am asked to construe the words strictly, which I intend to do. It is said you find the possessor of the *Hooton* estate referred to in this way. He is described as "Sir *Thomas Stanley*, of *Hooton*, in the county palatine of *Chester*, Baronet." That was his proper description. He lived at *Hooton*. He had a mansion-house and an estate there. Then you find the others described in the same way. For instance, another devisee is described in this way: "my nephew, *Richard Fermor*, the third son of the late *William Fermor*, Esq., of *Lusmore*, in the county of *Oxford*." Then (although there is no evidence of it) there is no doubt that the testator had two residences, for he describes himself as of *Sandoe*, in the county of *Northumberland*, Baronet, and of *Red Rice*, in the county of *Hants*. Of course the mere describing a man as of a particular house shews nothing whatever. It does not shew that he ever had an estate. He might have been a mere householder, or have held it from year to year. It only shews that he lived there. Beyond that, I cannot find any reference in this will to "estate" at all. There is nothing at all in this will, in my opinion, which shews any intention to refer to the ownership of an estate, and it appears to me that if that part of the argument were acceded to, I should be deciding the case upon conjecture and not according to the strict words of the proviso.

Then it is said that "eldest son" must mean heir at the time of the father's death. I cannot accede to that proposition. I know that there was a great contest at one time in our law as to what kind of heir took under the words "heir female," and that there was a point as to whether it must not be heir general, as well as heir female, but I never heard that a gift to the eldest son meant that he must be the heir at the time of the father's death. I have always thought it was the other way, and that the eldest son, if there was nothing more in the case, although he died in his father's lifetime, would take. As I said before, I cannot find anything to make eldest more than eldest in age for the time being.

Then I was asked whether it could mean "only." In the view that I have taken of this will, it is not necessary for me to consider

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that question, but for the reasons I have already given, it would follow that my opinion would be that it would apply to an only son.

Then I come to another point, the argument upon which I may say struck me with some surprise. It was said that if Sir *Rowland Stanley* lost the estate by virtue of the gift over in 1863, there was no obligation on the part of Sir *John Stanley* to take the name and arms within twelve months. It appears to me, reading the words strictly, that there was. The proviso as to that is this: "That the said *Richard Fermor*, *Rowland Stanley*, *John Stanley*, and *Charles Stanley*, and every other person who by virtue of the devises hereinbefore contained, or of this proviso, shall become entitled to the possession or the receipt of the rents and profits of the estate hereby devised, shall and do within the space of one year next after they shall respectively so become entitled to the possession or to the rents and profits of the said estate take upon him and them respectively, and use in all deeds, letters, and other writings, the surname of *Errington* only, and use no other surname, and take and bear the arms of *Errington* only and no other arms." Sir *John Stanley* is to take the name and arms upon his becoming by virtue of the proviso entitled, and there is a time fixed within which it is to be done. The words are, "shall and do within the space of one year next after they shall so respectively become entitled to the possession." It is said that "so becoming entitled to the possession" meant "under the devise hereinbefore contained or this proviso," and therefore that it did not apply to the man who took the estate by virtue of the proviso for cesser subsequently placed in the will. The fallacy, as it appears to me, of that argument is this, that Sir *John* took the estate by virtue, or would have taken it in 1863 by virtue, of the "devises hereinbefore contained." He claims under a devise to him for life, and all the proviso for cesser does is to accelerate the devise. It simply provides that when the estate of Sir *Rowland* ceases it shall go "to the use of such person as by virtue of the devise hereinbefore contained would become entitled," so that it is by virtue of the "devise hereinbefore contained" that he takes the estate at all. The clause does not impose the obligation to take the name and arms on the person "who shall take under the devise

hereinbefore contained and according to the times fixed by the limitations hereinbefore contained," but it says that the man who shall take the estate shall take the name and arms within twelve months after he shall have become entitled under the devise hereinbefore contained. It appears to me that Sir *John Stanley* in 1863 actually and strictly became entitled under the "devise hereinbefore contained," and that he ceased to be entitled in the year 1864; and that if he did not, he would cease to be entitled now by virtue of the operation of the second clause.

Then there is only one other argument which I think it is necessary to advert to. It was said that, assuming the proviso to take effect, the right heirs are not entitled under the will, and therefore no one is entitled. That argument appears to me to defeat itself, because if the proviso for cesser takes effect, Sir *John* is not entitled, and then the law throws the estates upon the heir or heirs; the proviso for cesser taking effect as an independent clause. If you look at it, it is this: "That in such case, and as often as the same shall happen, the estate hereinbefore devised to him so becoming the eldest son of Sir *Thomas Stanley*, and the remainder to the first and other sons of his body, shall cease, determine, and become void as if he were actually dead without issue male of his body." That is a proviso which destroys the estate, and you do not want the limitation over when you have a proviso for cesser under the *Statute of Uses;* and, in fact, in the limitations of terms of years it is not usual to put it in. The proviso for cesser destroys the estate; it is to "cease, determine, and become void;" and the law then casts it upon the heir because there is no one else to take it. Besides that, I do not agree in the reading of these words, which are, "To the use of such person or persons as by virtue of the devises hereinbefore contained would then be entitled as the person or persons next in remainder to the same estates in case such person so becoming the eldest son of the said Sir *Thomas Stanley* was then dead without issue male of his or their body or bodies, and the same person or persons shall in every such case be entitled to take the same estate and estates in the said premises hereby devised as he or they would have been entitled to take therein by virtue of this will if such person so becoming the eldest son of the said *Thomas Stanley* were

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actually dead without issue male as aforesaid." The proviso in the other clause is "that it shall go to the person next beneficially entitled in remainder under the devises hereinbefore contained in the same manner as if the person or persons whose estates shall so cease, determine, and become void, being tenant or tenants for life was or were dead, and being tenant or tenants in tail was or were dead without issue male," the one being "under the devises," and the other being "by virtue of the devise." I do not think that there is any difference between them. In fact they both mean the same thing; they mean that the person named in the next limitation is to take. Those words of reference are not to have no meaning given to them because the heir-at-law takes by a better title, or because the testator if he had known the law might have spared himself the trouble of devising the estates of which he was owner to his right heirs as he has done in express terms. As regards the estate purchased, those words would have given to the right heirs an estate by purchase and not by descent; but as regards the original devised estates, the heir takes by his better title, which so far superseded the title by devise that he was in as heir-at-law and not as devisee. It is, however, a fallacy to say that that clause of reference is to have no meaning because the words in the one case are "under the devise," and in the other "by virtue of the devise." These words obviously are a description of the person who is named to take and would give the estate to the heir. Besides, it would be most singular to hold that the estates to be purchased should go over and the other estates should not go over. That is a small point, but it seems to me that it points in the same direction as the other line of reasoning to which I have adverted, and brings me to the same conclusion, namely, that the heirs-at-law are entitled, and I shall declare accordingly.

I ought, perhaps, to refer to another point which was pressed on me, that the will, as I have construed it, is rather capricious, because each son must, in the ordinary course of nature, become an eldest son, they taking by seniority. The answer to that is, first, that I read the will strictly as I was asked to do; and, secondly, that the testator may not have contemplated every possible event.

Then as to the costs. I have jurisdiction to direct them to be paid out of the rents of the purchased estates, though not out of the devised estates; and I shall direct Sir *John's* costs to be so paid, for this reason: It was always the practice in the Court of Chancery that where a difficulty arose from the act of a testator, and the Court was thereupon called to construe his will with a view to the distribution of the estate, the costs of a Defendant who was a necessary party, and made a fair claim, were provided for. I shall follow that principle on this occasion; but I am not therefore to be understood as expressing any doubt as to the correctness of the view I have adopted. I understand the principle to apply whenever the Court does not think the contention utterly absurd and baseless.

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Sir *John Massey Stanley* appealed from this decision, and the appeal came on to be heard on the 7th of November, 1876.

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Cotton, Q.C., *Fry*, Q.C., *Wolstenholme*, and *Kekewich*, for the Appellant:—

Argument.

Sir *John* came into his present position fifty-six years after the death of the testator and thirty-four years after the death of his own father, and the question is whether that position is that of his father's eldest son. The Master of the Rolls dwelt upon the rule that a shifting limitation must be construed strictly, but in reality he construed it liberally against us. The meaning of construing such a limitation strictly is that a vested estate is not to be divested if there is a reasonable construction of the words which will leave it vested: *Doe* v. *Yates* (1). Now, is the construction which has been adopted the reasonable one? The Master of the Rolls says that when an eldest son dies leaving the second, the second becomes the eldest son, though the eldest has left male issue. This leads to an absurdity, for according to it the heir-at-law must have taken unless the eldest son survived all his brothers. The Master of the Rolls admits that we cannot here give "eldest son" its primary meaning. The secondary meaning which will give the most reasonable result ought to be adopted. In common

(1) 5 B. & A. 544, 554.

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parlance eldest son, when we are talking with reference to a family estate or a title, means the son who, if he survives the father, will, in the ordinary course of things, succeed to the title or the estate. We also talk of a man "making an eldest son," meaning that he will leave him the bulk of his property. In legal language we have a similar expression, "younger children," meaning children who do not take the family estate. A son who becomes the eldest surviving son, but does not take the family estate, does not lose his portion: *In re Bayley's Settlement* (1); *Collingwood* v. *Stanhope* (2). We say here that the father's death is a limit after which no son could become an eldest son. "Eldest son" is a term of relation, and properly continues only so long as the relation of father and son exists, *i.e.*, not after the father's death: *Corrance* v. *Corrance* (3); and that even if he could become an eldest son after his father's death, he could not be held to do so unless he succeeded to the *Stanley* estate. It is not for us to construe the gift over, it lies on the Plaintiffs to shew that it must be construed in such a way as to carry the estate over. Again, supposing the event to have happened on which the gift over is to take effect, how can the Plaintiffs claim the benefit of it? The gift over is to those claiming under the ulterior limitations of the will. The Plaintiffs claim as heirs-at-law, and, therefore, against the will, so cannot be objects of the gift.

Southgate, Q.C., *Chitty*, Q.C., *Davey*, Q.C., *Bagot*, *Badnall*, and *Smart*, for the different Respondents:—

The testator does not refer at all to the *Stanley* property; the question is as to the meaning of "eldest son," and is to be settled rather by a dictionary than by a law book.

[JAMES, L.J.:—I agree. How can the second son become the eldest? How can a son become the eldest when he has no junior?

BAGGALLAY, J.A.:—I do not think it a dictionary question. It is admitted that the expression cannot in this will be used in its strict sense of eldest born son. We then must find a meaning, either from authority or sense. May not the expression used

(1) Law Rep. 6 Ch. 590. (2) Law Rep. 4 H. L. 43.
(3) Law Rep. 1 P. & M. 495.

refer to becoming eldest surviving son before the estate comes into possession?]

That imports "during the father's life," and we contend that the authorities are against doing so. It is urged that the proviso must be construed strictly, and we admit it. That rule is defined in *Harrison* v. *Round* (1), and the rule in *Roddy* v. *Fitzgerald* (2) is also to be borne in mind. Construe the proviso according to these rules, and you have nothing to connect it with taking the *Stanley* estates, or acquiring the position of eldest son in the father's lifetime. *Livesey* v. *Livesey* (3) is very like the present case. It appears from the report in 13 Sim. that the father died in 1816. *E. W. Livesey* died in 1827, and the decree declared that the Appellant became the eldest son on the death of *E. W. Livesey*.

[*Cotton*, Q.C.:—The mother was living.

BRAMWELL, J.A.:—Perhaps in this case the testator meant "succeed to the title," assuming that the estate would go with it.]

Probably so, and gifts over on coming to a title take effect though the estate may have become separated from the title. In *Lambarde* v. *Peach* (4) and *Turton* v. *Lambarde* (5) there were stronger grounds than here for arguing that the estate did not go over. Now, as to whether a man can become his father's eldest son after the father's death, we submit that *Matthews* v. *Paul* (6) is a decisive authority that he can, and the observations there as to the difference between a gift by a person *in loco parentis* and a stranger are important. *Ellison* v. *Thomas* (7) and *In re Theed's Settlement* (8) support the same view, and *In re Bayley's Settlement* (9) does not help the Appellants. If this were a case of portions, I could not argue it, but it is a case of provision by a stranger, and this distinction is kept up all through the cases: *Lord Teynham* v. *Webb* (10), *Hall* v. *Hewer* (11), *Wilbraham* v. *Scarisbrick* (12), and other cases summed up in *Lewin* on Trusts (13).

(1) 2 D. M. & G. 190, 201. 17 Jur 565.
(2) 6 H. L. C. 823, 877.
(3) 2 Ibid. 419.
(4) 4 Drew. 553. 5 Jur N.S. 480
(5) 1 D. F. & J. 495. 6 Jur N.S. 233
(6) 3 Sw. 328.
(7) 1 D. J. & S. 18.
(8) 3 K. & J. 375.
(9) Law Rep. 6 Ch. 590.
(10) 2 Ves. Sen. 198, 210.
(11) Amb. 203.
(12) 1 H. L. C. 167.
(13) 6th Ed. p. 340.

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The same distinction is strongly put in *Collingwood* v. *Stanhope* (1), where it is laid down that the rules as to portions do not apply to shifting clauses. In the case of portions you are distributing one estate under one settlement which is intended to provide for the whole family. The framer of the will no doubt abstained from referring to the acquisition of the estate because he knew that if the property was referred to the shifting clause would not take effect unless the whole estate came to the eldest son by the same title. *Meyrick* v. *Laws* (2); *Gardiner* v. *Jellicoe* (3). The words of the clause are not to be strained, and the question is, what is the reasonable meaning of "become the eldest son"? Now a man is his father's son though the father be dead; the relation has not changed. If, then, his elder brothers die he becomes his father's eldest son.

[BRAMWELL, J.A.:—The word "surviving" seems to be necessarily implied.

JAMES, L.J.:—Are not the words equivalent to "shall become to Sir *Thomas Stanley* his eldest son"?]

No; that expression inserts a reference to the father's lifetime which does not exist in the expression actually used, and which the testator cannot be supposed to have contemplated, for in the natural course of things the father would die before his sons. We contend that "becoming an eldest son" covers the whole period during which there are sons living.

[BAGGALLAY, J.A.:—According to *Matthews* v. *Paul* (4), may it not be limited to the period before coming into possession?]

No; the testator considers that the event may happen more than once; he says, "So often as it shall happen." The very event has happened against which no doubt the testator intended to guard, the taker of these estates becoming the head of the *Stanley* family, so that he would be expected to take the *Stanley* estate, and he cannot have contemplated its being squandered.

[JAMES, L.J.:—We must, no doubt, deal with the case in just the same way as if the *Stanley* estates had not been sold.]

(1) Law Rep. 4 H. L. 43.
(2) Ibid. 9 Ch. 237.
(3) 12 C. B. (N.S.) 568.
(4) 3 Sw. 328.

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Cotton, in reply:—

As to the argument that the testator must have contemplated the father dying before the sons, it is to be observed that the testator in this clause is not dealing with the probable course of events, but with events which might occur to defeat his intention. Moreover, the children were very young, and it was very probable that some of them might die before their father. *Ellison* v. *Thomas* (1) was a clear case, and does not touch me; a class was to be ascertained at a particular period, and the only point was, whether a person was eldest son then. The decision in *In re Theed's Settlement* (2) was merely this, that, assuming the son could become an eldest son after his father's death, he was not such at the time when he must be so in order to be excluded. *In re Bayley's Settlement* (3) was a case where a class was to be ascertained at a particular time. *Lambarde* v. *Peach* (4) was a case of clear words. *Livesey* v. *Livesey* (5) and *Matthews* v. *Paul* (6) were cases of ascertaining a class at a particular period. In *Collingwood* v. *Stanhope* (7) the observations are in my favour. The rest of the cases referred to were cases of portions. The case, then, is left to be decided on principle, and the decision appealed from puts a forced meaning on the words. Would any one think of saying that King *James* II. became the eldest son of *Charles* I., or *William* IV. the eldest son of *George* III.

Dec. 3. JAMES, L.J.:—

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James, L.J.

This suit—for the two bills may be treated as one suit—is really an action of ejectment to recover possession of large estates which have devolved upon the Defendant under the will of a Mr. *Errington*, and are now held by him. [His Lordship here stated the material parts of the will.]

The contention against the Defendant is, that he has become the eldest son of Sir *Thomas Stanley*, and that thereby the shifting

(1) 1 D. J. & S. 18.
(2) 3 K. & J. 375.
(3) Law Rep. 6 Ch. 590.
(4) 4 Drew. 553.
(5) 2 H. L. C. 419.
(6) 3 Sw. 328.
(7) Law Rep. 4 H. L. 43.

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clause has taken effect, and that the estates now stand limited to the use limited to the testator's right heirs.

The facts are these: Sir *Thomas Stanley* died in 1841, leaving *William* his eldest son. *Rowland*, the second son, had in the meantime, on the death of Mr. *Errington*, in 1819, taken the devised estates. *William* died in 1863, and was succeeded in the baronetcy by *Rowland*. *Rowland* died in 1875, and was succeeded in the baronetcy by the Defendant *John*. *Charles* had died in the meantime, so that on the death of *Rowland*, *John* was the only surviving son.

The question is, whether thereby *John* became the eldest son of his father within the meaning of this proviso; and in answering this question it must be borne in mind that, according to a fixed canon of construction, a condition to operate as a defeasance of a vested estate must be shewn to have happened strictly and to the letter of it; that the law does not admit, in favour of the defeasance, of any *cy-près* performance or happening of the thing to be done or to happen. And there is this further rule, that the law is always in favour of a construction which vests the estate absolutely and indefeasibly at the earliest moment.

In answering the question whether Sir *John* has become the eldest son under the proviso in this will, I first ask myself this question: Putting aside for a moment the will, and all context and all considerations arising under it, has Sir *John*, as a matter of fact, become the eldest son of his father? I, for myself, answer that abstract question in the negative.

I have no idea that I have become the eldest son of my father because many years after his death my elder brother has died leaving me surviving. I think no one has ever said or thought that *William* IV., or the King of *Hanover* after him, ever was the eldest son of *George* III., or that *Charles* X. became the eldest son of the Dauphin, his father, because by the death of his brothers and the failure of their male issue he became King of *France*. Again, a man cannot literally become eldest or oldest unless he has juniors. Sole surviving and eldest are certainly not synonymous terms. If he is eldest because he has no seniors, then he is at the same time youngest because he has no juniors. It is said that eldest must in this case mean and include the last sur-

vivor, because the testator talks of the then youngest becoming the eldest son of his father. But the father might have had a score of other sons, and *Charles* might have become and been literally the eldest of a whole tribe of sons. No doubt it would be a very capricious and absurd limitation to make *Charles'* estate go over to the heirs-at-law if his father had other sons, but not to go over if he had not. But the gist and substance of the argument on the part of the Plaintiffs, as will be seen hereafter, is that it is open to a testator to be as capricious as he likes.

With these preliminary considerations in my mind, I proceed to consider what the meaning of "becoming eldest son" is according to the context, from which, and not from the literal import of the words, that meaning is to be gathered. In doing this, I feel that I am not only at liberty, but bound to look at the whole will, and what the testator was doing, and under what circumstances. The *Stanley* sons were his relations in this way, they were the sons of his great niece, who had married Sir *Thomas*, the then baronet.

Sir *Thomas* was the head of the elder branch of the ancient family of *Stanley* (himself the ninth baronet), and was in possession as tenant for life only of very large family estates, which were limited to his sons in tail, so that *William* was then heir apparent and next remainderman in tail. He was a young boy, and his brothers were children. The testator passes over the eldest son altogether, for no conceivable reason except that he was the eldest son, and makes the limitations which I have mentioned to the other sons then living. In the ordinary course of events the eldest son would succeed to the family estates, and it might be anticipated that he would in due course marry and have a son to succeed him. Is it possible to conceive that the testator really meant that if this, the natural event, the event which, of course, the testator must have anticipated and hoped for, happened, and that if the baronet died leaving a son to succeed to the family title and estates, and leaving *Rowland* surviving, then that *Rowland* and all his descendants should be turned out penniless, or, at all events, landless, to make room for *John;* but that if *Rowland* died a day before his elder brother, then *Rowland's* family would retain the estates, and *John* get nothing; that he meant that if the deaths of the four sons occurred in the very order in which the will contem-

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plates that they would occur, the elder dying first, and so on, all of them leaving sons, that the mere fact that the youngest survived his brothers, was to deprive them and their families, the objects of his bounty, for whom he had made such elaborate provision, by whom he had intended that the name and arms of *Errington* should be perpetuated, of all provision whatever, and give the estate over to his heirs-at-law whom he had postponed to the *Fermors* and to the *Stanleys*.

It may be said this is a consequence which he did not foresee, that events might well have happened which he had not thought of, and that we cannot alter his will in consequence. It frequently happens so, no doubt, with regard to wills, but that is ordinarily because a testator makes his provisions not recollecting that the deaths of his devisees may not take place in the exact order mentioned in his will. Thus, where a will contemplates that *A.* is to die and be succeeded by *B.*, and so on, *B.* may perversely die before *A.*, and so throw the whole frame and scheme of the will out of joint. But here the result would arise, not on any such unexpected disturbance of the contemplated order of events, but would be the necessary result of the state of things which the testator contemplated would happen. But it is said, again, a testator may be as capricious as he pleases; but this is something much more than caprice, it is a manifest absurdity which ought not to be attributed to a testator; it is even more, it is an act of refined cruelty to make his devisee live with this sword of *Damocles* hanging over him, trembling lest any mischance should cut short the thread of his elder brother's life. Are we really obliged to give to this will a meaning which might make it almost an act of heroic virtue and duty of a devisee to commit suicide if he heard that his elder brother was dying, and so avoid the family ruin which would follow from the misfortune of his surviving? In my opinion, no sane testator would make the estate of his devisee, and that devisee's line of issue, go over merely because the devisee survived his elder brother, such survival not in the slightest degree altering his position. Moreover, no ordinary Englishman writing to Englishmen, meaning merely to say if *B.* shall survive his elder brother, would use the *periphrasis* "If *B.* shall become his father's eldest son."

I may refer here, to shew the length to which the Courts have gone rather than impute an absurdity to a man, to the case in the House of Lords of *Abbot* v. *Middleton* (1). It is really on the same principle of rejecting a literal construction which leads to manifest absurdity that the Courts have held, in the many cases to which we have been referred, that an elder son means the son who gets the estate, and that "younger children" includes an elder who does not get it. It is on this principle that in so many cases "survivors" has been read "others." And it is only on the same principle, viz., to avoid obvious absurdity, that the word "children" is made to include "child," or the words "eldest" or "first-born" son can be made in any case under any circumstances to mean and include an only son. You suppose the testator to be a person of ordinary common sense, and you apply your own common sense in interpreting his words.

But the will admits of another construction, which to my mind is the natural construction of it. In all ages and in all countries in which primogeniture has prevailed the eldest son has a character, position, and *status* most marked and peculiar. We know what a position the king's eldest son holds in this country, what he held in *France*, what he holds in *Germany* and *Russia*. The same great distinction between the eldest son and the cadets of a family goes through every grade of territorial magnates, duke, baron, squire, and knight of the shire. The eldest son is the coming sovereign. He is the young lord and master while the father is the old lord and master; the eldest son is the person who, in the ordinary settlement of such estates as the *Stanley* and *Errington* estates would, with the father, be able to dispose of them and make a new disposition at their will and pleasure. When Mr. *Errington* made his will he knew that the eldest boy was in this position, and he left him out of his will, leaving him during his father's lifetime to be provided for by his father as eldest sons are, and at his father's death to take what would come to him thereupon. But it was possible, and not improbable, that he might die in his father's lifetime, and that thereby another son would take his place, and therefore, carrying out the same idea of excluding the eldest son and his line, he introduced

(1) 7 H. L. C. 68.

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the proviso in question. And I read the words "become the eldest son of" as meaning this, "if he shall come to fill the character and have the *status* and position of eldest son of — the character, *status*, and position which *William* now has." And this could only be in the father's lifetime. And indeed I do not see how, strictly or properly, a person's relation or position to another person can change after that person's death. You talk of a man, no doubt, as the son of a deceased man, but the relation of father and son was dissolved by death, and what you mean is that he was his offspring. You talk of the eldest surviving son, but that means the eldest of a class whom you sufficiently designate by that description, and the context may compel you, in order to avoid palpable absurdity, to include in that description an only surviving son.

Here the context seems to me to shew the contrary, and that it means the eldest son of a living man. The words "the eldest son of *A.*," and "*A.'s* eldest son," are in the English language exact equivalents, and cannot be translated into any other language (as I believe) except by one and the same form of expression. And if the expression there had been "shall become Sir *Thomas Stanley's* eldest son" there would, to my mind, be no reasonable possibility of a doubt. A man could not become another man's eldest son after the latter's death, any more than he could become his oldest servant, or his son-in-law, or his next of kin. No doubt you talk of a dead man's grandchildren, descendants, successors, &c., but grandchildren is only short for his children's children; descendants means descendants from him; successors means successors to him. The mistake in this case appears to me to be in not noticing that "eldest son" is not the same as "eldest of the sons," the proper synonym of which is eldest brother.

But it is said that you would still leave this absurdity or caprice untouched, that if the eldest son had died during his father's lifetime leaving a son and heir, the second son would, even according to this construction, have become the eldest son of the living man and lost the estate through that mere accident, and without any reasonable ground or motive for depriving him of it. I do not think that is so. I will give illustrations of what I think is meant and what I think is not meant by "eldest son" from English history.

When Prince *Henry* died, his brother *Charles* became the eldest son of King *James* I., but when *Frederick* died, leaving his son Prince *George*, no one became for any practical purpose, or in any substantial sense, or was ever considered to have become, the eldest son of *George* II.

There is a document which Mr. *Errington* was in all probability very familiar with—the table of precedence. In that the words "eldest son" occur repeatedly, the eldest son of a duke, eldest son of a marquis, and so throughout. If a duke's eldest or first-born son dies in his father's life without issue male, then, *but not otherwise*, the next son becomes the eldest; if the first-born so dies after the father's death, then the next son does not become eldest son of the duke, but becomes the duke. In matters of estate, in matters of dignity, "eldest son" has a technical meaning. And the same technical meaning is, I believe, to be found in the same matters in other countries, "*fils aîné*," "*figlio maggiore*," as contrasted with the cadets or junior branches. The words "eldest son" do not in this matter mean first-born son or oldest of the sons, but heraldically and in ordinary English parlance mean a man who has a living father and no senior in age or line, *i.e.*, no senior in blood.

By the construction which the Plaintiffs seek to put on the proviso, the whole matter is kept in suspense and uncertainty during the whole lifetime of several persons, so that no owner could, during all that time, know what would be the position or prospects of his family or of himself. But by the construction which I think on other grounds the more probable, more reasonable, and more natural construction of the words, the *status* of everybody would be ascertained at or before the death of Sir *Thomas Stanley*, the father.

It was suggested in the course of the argument that "becoming the eldest son" might possibly mean becoming the baronet or becoming the head of the family. I do not think it possible to get any such meaning out of the words, or upon any principle to make any such implication or guess. On any view of the case, actually becoming baronet or becoming head was not required. Becoming next in succession to the baronetcy and headship would cause the shifting, and that was the event provided for.

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I am of opinion, therefore, that the Plaintiff, on whom the burthen of proof lies, has failed to prove the defeasance, and I give my voice in favour of the Appellant. The costs must follow the event.

BAGGALLAY, J.A.:—

Having had an opportunity of reading and considering the judgment which has just been delivered by the Lord Justice, and entirely concurring in the views which he has expressed, and in the reasons which he has assigned, I have but few observations to make upon the case now under our consideration.

The question involved in these appeals is, what construction should be put upon the words "becoming the eldest son of Sir *Thomas Stanley*," as used in the shifting clause of Mr. *Errington's* will for the purpose of denoting the contingencies upon the happening of which the provisions of the clause were to come into operation.

Now, two interpretations have been suggested of these words, the one, that which has been adopted by the Master of the Rolls, and the other, that which has been enunciated by the Lord Justice. The former attributes to the words the meaning of "becoming the eldest in age for the time being of the sons of Sir *Thomas Stanley*," and fixes no period for the happening of the contingency short of the whole duration of the life of the person becoming in such sense an eldest son. The latter regards the words as denoting a change of *status* beyond, or in addition to, that of mere survivorship, and requires that such change should occur during the life of Sir *Thomas*. In the events which have happened, the substantial distinction between the two interpretations, so far as the present succession to the estates is concerned, is in the duration of the period within which the contingency was to happen. The Appellants or the Respondents will be successful according as this period was or was not limited to the life of Sir *Thomas Stanley*.

Now, the Master of the Rolls has treated the interpretation which he has placed upon the words as being the only strict interpretation of the language used by the testator. If this were so, however capricious might be the results to which such an interpre-

tation would or might have led, it must prevail unless controlled by the context or by a due consideration of such of the surrounding circumstances as may properly be called in aid. But I am unable to assent to this view of the strict interpretation of the words. In my opinion, a strict interpretation of the language used by the testator in the shifting clause requires that the event of "becoming the eldest son of Sir *Thomas Stanley*" should occur in the lifetime of Sir *Thomas*, inasmuch as a person cannot, in any grammatical sense or meaning of the words, become the eldest son of his father after his father's death, though a person who has been the eldest son in his father's lifetime would continue to be, and would be accurately described as, his eldest son after his death. But though this interpretation of the words cannot, in my opinion, be regarded as a strict interpretation, it may, nevertheless, be the interpretation which ought to be adopted, if it be required or supported by the context. But so far from this interpretation being required or supported by the context, its effect would be to defeat the testator's intentions, as expressed in the other portions of his will, in almost every event which could be reasonably contemplated at the time when the will was made.

In the earlier part of his will Mr. *Errington* had declared his wishes and intentions as regarded the destination of his *Northumberland* estates in a series of limitations, as to the meaning of which there cannot be the slightest doubt or question, each life estate—and there are four such estates—is followed by estates in tail male to the sons in succession of the tenant for life; and nothing can be more certain than that the testator intended, so far as his intention can be ascertained from the language of these limitations, that neither *John Stanley* nor *Charles Stanley* should succeed to the estates so long as there should be any such issue living of *Rowland*, and as regards *Charles* so long also as there should be any such issue living of *John*, and further, that his own right heirs should not succeed to the property except in the event of there not being any such issue living of either *Rowland*, *John*, or *Charles*.

And the intentions of the testator to secure the provisions so made by him for the sons of the several tenants for life is further evidenced by the provisions of the name and arms clause, by

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which he expressly directed that the failure of any of the tenants for life to comply with such provisions should not prejudicially affect the estates limited to their sons.

Now, if the interpretation adopted by the Master of the Rolls is the correct interpretation of the language used in the shifting clause, all these carefully-expressed intentions of the testator in favour of the issue of the several tenants for life would have been entirely defeated if *Rowland*, *John*, and *Charles*, as well as their eldest brother *William*, had died in the order of their respective seniorities of age, and if each or any of *Rowland*, *John*, and *Charles* had left sons or male issue of sons capable of succeeding under the previous limitations; and the possibility, if not the probability, of the happening of these contingencies must have been present to the mind of the testator, inasmuch as they would have been in complete accordance with the order of succession which he had himself selected, as well as with the ordinary expectations of the duration of human life.

Again, the adoption of the same construction would necessarily lead to the following result: that whilst the testator has carefully guarded against the failure of the limitations in favour of the sons of any tenant for life by reason of any act of negligence on the part of their father in not complying with the provisions of the name and arms clause, he has nevertheless directed that such limitations shall wholly fail as regards the sons of each and every of the several tenants for life being sons of Sir *Thomas Stanley* upon the happening of events over which such tenants for life could not possibly exercise any control, and in respect of which they could not be guilty of any negligence, viz., their respectively surviving all their elder brothers.

But if to interpret the words "becoming the eldest son of Sir *Thomas Stanley*" as equivalent to "becoming the eldest in age for the time being of the sons of Sir *Thomas Stanley*," is to give to them an interpretation which is neither the strict interpretation nor a modified interpretation required or supported by the context, it follows that it is the duty of the Court to reject it. In such a case it might also be the duty of the Court, if the words used by the testator were of such ambiguous and doubtful construction that no reasonable or certain interpretation could be given to them,

to reject altogether the provisions of the shifting clause and to give full effect to the previous limitations; and I was for some time pressed by the consideration that that might be the proper course to pursue in the present case, but, upon more mature consideration, I am satisfied that there is no occasion to adopt such a course, inasmuch as the language of the shifting clause does, in my opinion, admit of a clear and reasonable construction, and one which would have rendered the various portions of the will harmonious at the time when it was executed, and adapted to the several contingencies which at that time might be reasonably anticipated, though in some respects the testator's wishes and intentions might have been defeated in consequence of the happening of events which were not contemplated by him, and for which no provision was made. That construction is the one which has been explained in detail by the Lord Justice, and to which I need not further allude. Upon the whole, I am of opinion that these appeals should be allowed.

BRAMWELL, J.A.:—

I am of opinion that the decree of the Master of the Rolls was right, and should be affirmed. The question is not an abstract one, what is the meaning of the words "become," "eldest," and "son," in themselves. It is, what is their meaning in conjunction, and as the testator has used them? "Eldest son" may mean one thing abstractedly, another in conjunction with other words. If nothing else appeared, I should say "eldest son" meant eldest born. Here it manifestly does not mean that, for it supposes that each of all four sons may be eldest. If any one said that *William* IV. was the eldest son of *George* III., he would not merely use careless and inappropriate language, but would be wrong and convey a wrong idea to his hearer. If he said that, on the death of *George* IV., *William* IV. became the eldest son of *George* III., and as such succeeded to the throne, his language might be inaccurate, critically and hypercritically considered, but it would convey no erroneous idea to the hearer. As to dealing with the matter "strictly," I think that word had better be left out—whatever it may mean, as the Master of the Rolls says—for if it means "correctly" it is superfluous, if it means anything

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else it is wrong and mischievous. Probably it means this, and then is right enough in substance, though not an apt word, viz., that, the estate being in the Defendant at one time, it is for the Plaintiff to shew that by the words of the will, and in the events that have happened, it is out of him—that the burthen of proof or demonstration is on the Plaintiff. And I perfectly appreciate Mr. *Cotton's* argument, that it is not for him to give the words a meaning, that his client is entitled to succeed unless it is shewn that the meaning is such as disentitles him. But if a sensible meaning is given to them which does disentitle him, it calls on him to give a better. I am of opinion the Plaintiff has shewn that the words are not meaningless, that he has given a meaning to them, and that no better is suggested for the Defendant.

The words are few: "In case the said *R. Stanley*, or *John Stanley*, or *Charles Stanley* shall become the eldest son of the said Sir *Thomas Stanley*, then, &c." Now, as no one of them was the eldest-born son, and never could become so, the words mean something other than eldest-born, and consequently can only mean "become" eldest surviving son. As to this, I do not understand there is any controversy. Then it was said or hinted that a man could not be eldest unless there were other, more than one younger. This is a desperate point. If it were well founded, the limitation to the first son of each of the three, *Rowland*, *John*, and *Charles*, would fail unless such son had a brother, as he could not, on the argument in question, be first where there was no second. It seems to me, therefore, there can be no doubt that the words mean "become, by the death of his elder brother or brothers, the oldest, or older, or only son of Sir *Thomas Stanley*."

Then the next point made was that "son" supposes "father," that a man cannot become the eldest son of another unless that other is living, that, consequently, the words must be read as though they were "shall become the eldest son of Sir *T. Stanley*, in his Sir *Thomas's* lifetime." I need not say I treat this argument with the greatest respect. I do not think it open, if well founded, to the objection that it inserts words, for if well founded it shews that those words "in his Sir *Thomas's* lifetime," are as much there as the word "surviving." But I think the argument is not well founded. I think it does insert words for which no

sufficient reason can be given, and it is at least certain that the testator might have inserted them if he thought fit. I think the natural meaning of the words is "become the eldest son of living or dead Sir *Thomas Stanley*." No doubt the word "son" supposes father, but father alive or dead—"posthumous son" is not inaccurate. It is not inaccurate to say, "*A. B.* died and left four sons. *John* is his eldest surviving son." But it is said that here the words are "become the eldest son," and that a man cannot become anything unless all the conditions necessary to his being so exist. But see to what this leads. Suppose the words had been "in case *Rowland Stanley*, or *John Stanley*, or *Charles Stanley*, the second, third, and fourth sons of Sir *Thomas Stanley*, shall become the eldest," there would be no ground for the argument in question. Yet can it be said there is a difference between those and the present words? The fallacy is in coupling the word "become" with "son." It should be coupled with "eldest." That is the only thing that he can become. He is son already. Moreover, the testator says in case either shall become the eldest son, then and in such case, and so often, &c. There is no limit of time, and the testator evidently supposes it may happen more than once. I know that the qualification supposed by the Defendant is not one of time, it does not depend on any effluxion of time but on an event which may happen in five or fifty years, viz., the death of a son living the father; but I say that the testator contemplated a succession of events which he could hardly suppose would all happen in Sir *T. Stanley's* lifetime. Suppose Sir *T. Stanley* had been dead when the will was made, would the language of the shifting clause be unmeaning? It might be said "No," for his being dead might be proved as one of the surrounding circumstances. Be it so. Suppose he had died after the making of the will, but before the testator, would the clause become inoperative? But reasons are given to shew that what the Plaintiff contends for cannot be the meaning of the words, or if it might be, that there is or are one or more preferable. A forcible argument is, that it cannot be that the testator meant that in the natural course of things the *Stanleys* should lose the devised estates, and yet that, on the Plaintiff's contention, that would happen. For that in the ordinary course of nature, *William* would survive his father, *Rowland* would survive *William; John*,

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Rowland; and *Charles, John;* so that each of the three brothers would be oldest in turn, and each lose the estate. The first observation on that is, that (supposing the perils of infancy over) the eldest son will probably survive his father, the second the eldest, the third the second, and the fourth the third, at least I suppose so. But the consequence contended for is nevertheless not the probable one. The probabilities are against any one son surviving his father and three brothers. Supposing them all adults, an annuity for the lives of the father and eldest three sons, or the survivor, would be a much better thing than an annuity for the life of *Charles.* But this is not worth pursuing. I repeat what I said on the argument. There is no mistake greater than the common one of arguing that a man did not mean what he has said because he did not mean all its consequences, forgetting that it may well be that they were not present to his mind, and that he had no meaning or intention about them. Assuming they were, in this case the will may be capricious, but it would have a possible and probable operation, viz., *Rowland, John,* or *Charles* dying and leaving issue living an elder brother. Let us now see if the suggested meaning is less capricious? In the first place the same consequences would follow if the three sons, *William, Rowland,* and *John,* died in succession living their father, though each left issue, a thing not likely but possible. Another thing both possible and probable or not improbable is, that *Rowland* should die living his father and elder brother, leaving children, then the father and elder brother die, the latter childless, and yet *John* would not take, the eldest son of *Rowland* having the *Stanley* estates and the devised estates; or *William* might die leaving children, *Rowland* would lose the estate and *John* take it and his children keep it if he died before *Rowland,* the father still living. Or Sir *Thomas* might have died leaving all four sons children, then *William* might have died a child, and then *Rowland* would, according to the construction contended for, have both the patrimonial and devised estates.

I think, then, the meaning of the words contended for by the Plaintiff is the natural meaning, attended, indeed, with consequences the testator did not intend. I think the meaning contended for by the Defendant is not the natural meaning, and

equally attended with consequences that could not have been intended. Another mark of caprice or improvidence is, that no provision is made for further children of Sir *Thomas Stanley*, though he might well have them, as the four sons ranged in age from one to four years, as is mentioned in the judgment of the Master of the Rolls. If I had to decide according to what I believe the testator meant I should decide adversely to the Plaintiff. For I judge or guess that he meant that if any brother came to the title the estate should go from him and his issue, his reason probably being that in such case that son and his family would probably be sufficiently provided for. That has happened. No doubt the testator might have said so, and has not. Mr. *Chitty* gave a reason why he did not make the estate go over on the patrimonial estates devolving on either of the sons, possibly some reason might be given for his not saying they were to go over if the title devolved. But the speculation is unprofitable, for the case does not turn on its correctness. If I was told he meant either what I consider he has said, or what in the judgment of the Lords Justices he is considered to have said, and I was called on to guess which of the two he meant, I should say the latter, as the less capricious and unlikely. But the question is not what he meant, but what he has said. I am of opinion he has said what is contended for by the Plaintiff. He has made a will which, whatever is the meaning of the words, is and must be considered capricious if they express his intention, and shortsighted if they do not. I have doubted whether the clause could not be treated as meaningless and void, on the ground of the irrational consequences of the only meaning I can give to it. No such point has been suggested at the Bar or on the Bench. I will, therefore, do no more than throw it out for consideration, merely saying, I think it could not be sustained. I am of opinion the decree should be affirmed.

Solicitors: *Meynell & Pemberton; George Bonnor; Gregory, Rowcliffes, & Rawle.*

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Nov. 29;
Dec. 6.

PLIMPTON *v.* SPILLER.

[1876 P. 69.]

Patent—Infringement—Interlocutory Injunction—Undertaking by Defendant to account—Balance of Convenience—Stopping a Trade.

Discussion of the principles on which the Court ought to act in determining whether to grant an interlocutory injunction to restrain an alleged infringement of a patent, or only to require the Defendant to keep an account.

Statement.

THIS was an appeal from a decision of the Master of the Rolls.

The writ was issued on the 11th of March, 1876. By the statement of claim, delivered on the 26th of April, 1876, the Plaintiff claimed an injunction to restrain the Defendants from infringing his patent, dated the 15th of August, 1865, for improvements in the construction of roller skates, and also for an account of profits made by the Defendants by the sale of skates manufactured by them, or for damages. The validity of the Plaintiff's patent was established in an action of *Plimpton* v. *Malcolmson* (1). On the 16th of March the Master of the Rolls, upon the undertaking of the Plaintiff to abide by any order the Court might make as to damages, in case the Court should thereafter be of opinion that the Defendants should have sustained any, by reason of the order, which the Plaintiff ought to pay, granted an injunction to restrain the Defendants, until the trial of the action or further order, from making, using, or putting in practice the invention described in the Plaintiff's specification. On the 4th of August the Plaintiff moved to commit the Defendants for a breach of the injunction. The alleged breach was the sale by the Defendants of a kind of skate, known as the "*Wilson*" skate, which the Plaintiff alleged to be an infringement of his patent. The Defendants had commenced selling this skate since the injunction of the 16th of March had been granted. Before the motion to commit came on to be heard a motion for injunction in another action of *Thorn* v. *Worthing Skating Rink Company* was heard by the Master of

(1) 3 Ch. D. 531.

S C at hearing 6 Ch D. 412.

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the Rolls. That action was brought by the Plaintiff *Plimpton* and a licensee from him to restrain the Defendant company from infringing his patent by using the "*Wilson*" skate. The Master of the Rolls, upon the hearing of that motion, expressed a strong opinion that the "*Wilson*" skate was an infringement of the Plaintiff's patent, and granted an injunction till the hearing, the Plaintiffs giving an undertaking as to damages. When the motion to commit the Defendants in *Plimpton* v. *Spiller* came on to be heard, the question whether the "*Wilson*" skate was an infringement of the Plaintiff's patent was not again argued. The Master of the Rolls did not make an order for committal, but, on the undertaking of the Plaintiff as to damages, granted an injunction to restrain the Defendants until further order from making or selling any skate like the "*Wilson*" skate.

Statement.

The Defendants appealed.

Davey, Q.C., *North*, *Goodeve*, and *Chadwyck Healey*, for the Appellants:—

Argument.

We contend that the "*Wilson*" skate is not an infringement of the Plaintiff's patent. At any rate, there is a question to be tried, and if the injunction is continued our trade will be destroyed, and it will be impossible afterwards to ascertain the damages which we have sustained. The Plaintiff being a foreigner, his undertaking as to damages is practically worthless. We are willing to keep an account of our sales and profits, and to give an undertaking to be bound by the result of the action of *Thorn* v. *Worthing Skating Rink Company*. It is very questionable whether the Court had any jurisdiction upon a motion to commit to make an order for an injunction.

H. Matthews, Q.C., *T. Aston*, Q.C., *Waller*, Q.C., and *W. N. Lawson*, for the Plaintiff:—

If the Defendants are allowed to continue their trade, which mainly consists in selling to skating rink companies, the Plaintiff will be compelled to proceed against all the purchasers.

[JAMES, L.J.:—There is no action against the Defendants in respect of the "*Wilson*" skates.]

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We will undertake to try the question whether they are an infringement of our patent in this action.

[JAMES, L.J.:—I think you must satisfy us that enough has been made out to justify an order for committal.]

Argument.

The order made by the Master of the Rolls was practically assented to. He was of opinion that the "*Wilson*" skate was an infringement of the Plaintiff's patent, but he did not wish finally to decide that question upon the motion, and therefore he made the order in the form he did.

Davey, in reply.

Judgment, James, L.J.

JAMES, L.J.:—

I think that after the full discussion this case has received I now see my way to the disposal of it in accordance with the principles and practice of the Court. When I come to consider what was really done by the Master of the Rolls it is this: Though the case assumed the form of a motion to commit for contempt, the fact of the contempt was not then made out to the satisfaction of the Court; and what the Master of the Rolls really meant to do was, to reserve the final decision of the question whether a contempt had been committed until the further hearing, when the case would be fully heard in some shape or other upon the cross-examination of the witnesses, and the fuller discussion of the principles, and when further evidence might be brought in; and therefore he said: "I do not now determine the question. I reserve it. I do not now decide, aye or no, whether any contempt has been committed. I think that if there has been an infringement there has, beyond all question, been a contempt. For although the Defendant might say, 'I did not intend to commit a contempt,' yet if he was actually infringing, though he thought he was not, he was still guilty of contempt, and must be punished for it in some way or other." The Master of the Rolls appears to me to have in fact adjourned the decision of that question for a further and final hearing, exactly in the same way as upon an interlocutory motion for an injunction the question of infringement is reserved.

Moreover, it does not seem to have been really questioned before the Master of the Rolls that, if he took that view of the case, he might deal with the motion as a motion for an injunction, which he in fact did.

Judgment, James, L.J.

Well, then, I think we have got to deal with it in exactly the same way as if it were a motion for an injunction against a new Defendant, the validity of the patent having been already established. And then, of course, the Court, not forming an opinion very strongly either one way or the other whether there is an infringement or not, but considering it as a fairly open question to be determined at the hearing, and not to be prejudiced by any observation in the first instance, reserves the question of infringement as one which will have to be tried at the hearing, and which it will then have to consider. There will always be, no doubt, the greatest possible difficulty in determining what is the best mode of keeping things *in statu quo*—for that is really what the Court has to do—to keep things *in statu quo*—until the final decision of the question; and then, of course, the Court says, "We will not stop a going trade. We will not adopt a course which will result in a very great difficulty in giving compensation on the one side or on the other." We have to deal with it as a practical question in the best way we can. I think, on the whole, that the Master of the Rolls has made the right order, viz., by granting the injunction and putting the Plaintiff upon an undertaking to abide by such order (if any) as to damages as the Court may think fit to make if he should ultimately turn out to be in the wrong; and that it would not be right in this case merely to put the Defendant upon the terms of keeping an account, which I conceive might be a very clumsy and inefficient mode of recompensing the Plaintiff if he should turn out ultimately to be in the right.

Baggallay, J.A.

BAGGALLAY, J.A.:—

As the other members of the Court are of opinion that the order of the Master of the Rolls should be affirmed, it is immaterial for the decision of the case what view I may take; but I am desirous of stating very shortly why I have arrived at a different conclusion. The motion was in form to commit for contempt, and I think it is clear from the facts, and particularly from the circumstance

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that the Defendant practically accepted the decision in the previously heard case of *Thorn* v. *Worthing Skating Rink Company*, that the motion was treated by the Master of the Rolls as if it had been a motion for an injunction. Otherwise, the simply accepting the decision in the former case on a motion for injunction would hardly have met the justice of the case. Well, then, treating this as a motion for an injunction to restrain the Defendant from continuing to manufacture any articles after the form which has been called the "*Wilson*" skate, I am bound to say that I think there is a case to be tried at the hearing; and that being so, the only question is what should be done in the meantime.

Now it has always appeared to me that the observations of Lord *Langdale* in the case of *Bridson* v. *McAlpine* (1) indicate the course which the Court should take in a case like the present. He said this: "There are many cases in which it is not clear either that the patent is legally valid, or that it has been infringed. It depends on the degree of doubt which exists on these questions, whether the Court will grant the interim injunction. In such cases it will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction." And a little further on he says: "According to the doubt which may exist in the mind of the Court upon the facts, and according to the degree of inconvenience to the parties, the Court, not thinking fit to grant the injunction at the time, may take one of several courses: it may either refuse to grant the injunction simply, or it may refuse it on the terms of the party undertaking to keep an account, or it may direct the motion to stand over on the terms of the Plaintiff proceeding to a trial at law." Observations very much to the same effect were made by Lord *Cottenham* in *Neilson* v. *Thompson* (2), in which he pointed out that you might cause very much greater mischief to the Defendant by granting an injunction, if it should ultimately turn out that it ought not to have been granted, than you would cause to the Plaintiff by postponing the injunction when there was ground for its being granted.

Now it appears to me in the present case that the granting of

(1) 8 Beav. 229, 230. (2) 1 Webs. P. R. 278.

the injunction, if the Defendant should ultimately prove to be right, would do him irreparable damage. He would be restrained for some length of time from manufacturing these skates; it would be impossible to ascertain to what extent he might have carried on the business of manufacturing or selling skates, and the amount of profits he might have made in the meanwhile, if he had not been restrained by the injunction. It may well be—indeed we have been told that a vast number of patents for these skates have been taken out in the present year—that some new invention will be discovered which will make his invention useless in the course of some eight or ten months. It seems to me that there will be no means of measuring the damage which he will sustain by the injunction if he should eventually turn out to be right. On the other hand, if we do not grant the injunction, but require the Defendant to keep an account of all the skates he has sold and the profits he has made by them in the interval between the present time and the ultimate hearing of the cause, the means will be afforded for ascertaining the loss which the Plaintiff will have sustained by the continuance by the Defendant of that which may prove to have been an improper business.

It has been suggested that the Defendant's undertaking may not be of any value; that the Defendant may be a man of straw, and may eventually not be able to repay the royalties or profits which he may have received. But on the other side, if an undertaking as to damages is given by the Plaintiff, inasmuch as he is a foreigner, it may be absolutely impossible to obtain the damages from him. I do not attribute much importance to this argument one way or the other; but it does appear to me that if damages have to be recovered from the Plaintiff, the amount of them will be very much larger than the amount which would have to be recovered as profits from the Defendant. It has been said that if this injunction is not granted at once, it will be necessary for the Plaintiff to bring a number of actions against other persons for the purpose of obtaining injunctions against them. But, if it is thought expedient to do so, the Court may not be satisfied that there has been an infringement, and the injunctions may not be granted. At any rate, I do not think that this Court would be justified in refusing to do what would be just towards

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a particular party because the doing that thing in his favour might be the cause of ulterior proceedings against persons who are not parties to this suit.

Judgment, Baggallay, J.A.

However, as I have already said, the other members of the Court think that the course which has been taken by the Master of the Rolls is the one which will best meet the ends of justice. I have, no doubt, arrived at a wrong conclusion, but I have thought it right to state my reasons for it.

Brett, J.A.

BRETT, J.A.:—

I agree with Lord Justice *James*, that the order of the Master of the Rolls is right. I take it that, without expressing any decided opinion as to what may be the result, sufficient has been made out to entitle the Plaintiff either to an injunction or to an order for the Defendant to keep an account. I am very glad that the difficulty as to the form of the original application has been got rid of, and that being so, I take it that it is established that the one order or the other should be made.

Well, now, if you assume that the Defendant is in the right, there is no doubt that an injunction is a great hardship upon him; but if you assume that the Plaintiff is right, then the mere keeping of an account by the Defendant seems to me to be a great hardship on the Plaintiff, for he would be driven to commence actions against the purchasers from and customers of the Defendant, which would obviously lead to a multiplication of suits. There will be a hardship on the one side or on the other, and the question is, on which side does the balance appear to lie? Now if the trade of a Defendant be an old and an established trade, I should say that the hardship upon him would be too great if an injunction were granted. But where, as here, the trade of the Defendant is a new trade, and he is the seller of goods to a vast number of people, it seems to me to be less inconvenient, and less likely to produce irreparable damage, to stop him from selling, than it would be to allow him to sell and merely keep an account, thus forcing the Plaintiff to commence a multitude of actions against the purchasers.

Therefore, as a rule of conduct, I think that in such a case as this it is better, where the trade of the Defendant is a new one—

and not an old established trade—and where there are likely to be many customers of the new trade, to say that you will act against the new trader by injunction, whereas if he were carrying on an old trade you would act in the other way.

C. A. 1876 PLIMPTON v. SPILLER.

Solicitors for Plaintiff: *Ward, Mills, Witham, & Lambert.*

Solicitor for Defendant: *W. W. Wynne*, agent for *H. Cross, Prescot.*

In re TERRELL.

Ex parte TERRELL.

Ex parte SHEFFIELD AND ROTHERHAM JOINT STOCK BANKING COMPANY.

C. A. 1876 Dec. 7.

Composition—Registration of Resolutions—Power of Majority of Creditors to bind Minority—Bona fides—Resolutions passed for the Benefit of the Debtor—Power of Court to summon a fresh First Meeting.

The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts amounted to £11,358, while his assets were only £75. Of the debts, the preferential claims amounted to £127. The creditors, by the proper statutory majority, resolved to accept a composition of 1*s.* in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. One of the dissentient creditors opposed the registration:—

Held (affirming the decision of the Registrar, sitting as Chief Judge), that the resolution could not have been passed in the interest of the creditors, but must have been passed for the benefit of the debtor; that it therefore was not binding on the dissentient minority, and that the Registrar was right in refusing to register it:

Held, also (affirming the decision of the Registrar), that the Court had power to direct a fresh first meeting of the creditors to be summoned for the purpose of the debtor's offering a fresh composition, to be secured to their satisfaction.

The power to direct a fresh meeting to be summoned extends not only to a case where, through accident or mistake on the part of the debtor, no valid resolution has been passed, but also to a case where, owing to a mistake on the part of the creditors, or from any other cause, no valid resolution has been passed.

Statement.

THESE were appeals from two orders made by Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 9th of June, 1876, *Hull Terrell* filed a liquidation peti-

C. A. 1876 *In re* TERRELL. *Ex parte* TERRELL. *Ex parte* SHEFFIELD AND ROTHERHAM JOINT STOCK BANKING COMPANY. Statement.

tion. He was a solicitor, but had retired from practice. He had formerly carried on business in partnership with his son, and afterwards with his son and a Mr. *Honey*. The partnership was dissolved in February, 1875, and the business was thenceforth carried on by the son and *Honey*. The first meeting of the creditors was held on the 24th of June, 1876. The debtor's statement of affairs then produced shewed that his debts amounted to £11,358, and that his assets were only £75. Of the debts, £127 were due in respect of preferential claims for rent, rates, and taxes. The meeting was adjourned to the 5th of July. At the adjourned meeting the creditors resolved by the proper statutory majority to accept a composition of 1*s.* in the pound, payable within one month of the date of the registration of the resolution. This resolution was confirmed at the second meeting on the 18th of July. No security was given for the payment of the composition, but it was represented to the meeting that the debtor's son would provide the money to pay it, he and his partner being desirous of avoiding the injury which might be done to their firm if their late partner was adjudicated a bankrupt. The *Sheffield and Rotherham Banking Company*, who were creditors for £518, dissented from the resolution. They had filed a bankruptcy petition against the debtor on the 21st of April, upon which an adjudication had been made on the 27th of June, but the advertisement of the adjudication had been stayed. The bank opposed the registration of the resolution. A clerk of their solicitors, who had acted as their proxy at the meetings, made an affidavit in which he stated that the resolution was not passed *bonâ fide* in the interest of the creditors, but from motives of kindness to the debtor, and also from a desire not to press too hardly on the firm of *Terrell & Honey*, who were young solicitors just starting in business. In answer to this, the debtor's son deposed that the resolution was not passed from motives of kindness to the debtor, or to any one else, but in the interest of the creditors, who saw clearly that by doing so they were securing a larger sum for themselves than they could possibly get by any other course. The Registrar, by one order, refused to register the resolution, upon the ground that the composition was not secured, and that the debtor's statement did not disclose any assets. At the same time the Registrar made

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another order, that the debtor should be at liberty to summon a new first meeting of his creditors for the purpose of offering a composition to be secured to their satisfaction. The bank presented an appeal from the second order, and the debtor then gave notice of appeal from the first order. The debtor's appeal was heard first.

Argument.

Marten, Q.C., and *J. G. Laing*, for the debtor:—

The composition was clearly for the benefit of the creditors. There being practically no assets, the creditors could have got nothing in a bankruptcy or a liquidation. The debtor being an old man, there was no prospect of his earning anything. And, though no security was given for the payment of the composition, yet the creditors had as great a hold upon the son as if he had agreed to find the money, because they knew that he was desirous to save his own firm from the discredit which might be cast upon it if the former partner in it was made a bankrupt. The resolution must have been passed *bonâ fide* in the interest of the creditors, and not in the interest of the debtor, and therefore the cases of *Ex parte Russell* (1), *Ex parte Staff* (2), and *In re Page* (3), do not apply. *Ex parte Linsley* (4) and *Ex parte Elworthy* (5) are in our favour. In previous cases where a composition has been held bad, it has been on the ground that the assets would have enabled the debtor to pay a larger one. Here the creditors are to get much more than the assets would give them. Payment in a month is practically immediate payment, and, if the payment be not made then, the original debts revive.

R. T. Reid, for the bank, was not called on.

Judgment, James, L.J.

JAMES, L.J.:—

The decisions in *Ex parte Page* and *Ex parte Russell* are binding upon this Court. The Court then put a judicial construction upon the Act with regard to these compositions, and we came to the conclusion that the creditors must act *bonâ fide* in the interest of

(1) Law Rep. 10 Ch. 255.
(2) Ibid. 20 Eq. 775.
(3) 2 Ch. D. 323.
(4) Law Rep. 9 Ch. 290.
(5) Law Rep. 20 Eq. 742.

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the creditors, just as it was held with regard to deeds of arrangement under the Act of 1861 by the then Court of Appeal. This Court has laid it down that the resolutions must be passed *bonâ fide* in the interest of the creditors, and must not be mere sham resolutions. The facts of the present case shew that the resolution could not have been passed *bonâ fide*. The debtor had no assets; he merely gives his promise to pay the composition, and nobody else offers to give any security for it; the creditors merely accept the hope that the son will in the course of a month find the money to pay it. That is not the sort of arrangement which, as it appears to me, was contemplated by the Act as one which could bind the dissentient minority of the creditors. I think the Registrar was quite right in refusing to register the resolution.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. I assent to the general principle that there is no duty cast upon the Registrar of ascertaining whether the resolutions are such as it would be prudent for the creditors generally to accept. His duty is merely to see whether the meeting was properly convened, whether the resolutions were passed by the proper statutory majority, and whether there was laid before the meeting the statement of affairs which the Act requires. But in order to discharge this duty he must ascertain whether the resolutions have been passed *bonâ fide;* in other words, in accordance with the language used in the judgment of Lord Justice *James* in *Ex parte Page* (1), whether the resolutions were "such that the majority of the creditors could reasonably and properly bind the minority by them." It was held in that case that the resolutions were not such as could reasonably and properly bind the minority, and I am clearly of opinion that such is the case here. It is part of the case set up that there are no assets at all, and that there is no security given for the payment of the composition; consequently the resolution in substance amounts to nothing more than a release of the debtor from his obligations.

Brett, J.A.

BRETT, J.A.:—

In order to obey the authority of any case, it is not sufficient to

(1) 2 Ch. D. 324.

look merely at its facts, because in no two cases do the facts agree, and it is not sufficient to look at the mere words used in one part of the judgment. But it is necessary to discover what is the principle upon which the Court decided the case, and that principle is binding, and ought to be applied in future cases. I take it that in all the cases which have been decided with regard to the duty of the Registrar, it has been held that, so long as it can be said that the creditors have acted within the statute, then all the Registrar has to do is to register the resolutions. He has no authority to determine anything as to the wisdom of the resolutions. He cannot reject them on the ground of any amount of foolishness in them. He may, however, determine whether the creditors have acted unfairly in the interest of the debtor, because, if they have done that, it cannot properly be said that they have passed resolutions according to the statute, and the resolutions ought not to be registered. Now, in *In re Page* (1) the first part of the judgment no doubt says that the Registrar had come to the conclusion that the resolutions were not such as to justify the binding of the minority of the creditors by the majority; that is perfectly correct. But I apprehend the reason why that proposition is laid down is, because the next proposition stated in the judgment had been substantiated; for it goes on to say, "The Legislature has given great power to the majority, but it must be exercised *bonâ fide* in the interest of the creditors, and not from motives of kindness to the debtor. There must be a *bonâ fide* resolution of the creditors dealing as creditors." That is the foundation of the judgment, and that is the reason why the resolutions in that case were not such that the majority of the creditors could reasonably and properly bind the minority by them. The only question, therefore, which the Registrar can properly try, besides the formal matter whether the requisites of the statute have been fulfilled, is, whether the resolution was a *bonâ fide* one, and he has a right to come to the conclusion that it was not so if the majority were acting, not *bonâ fide* in the interest of the creditors, but from motives of kindness and benevolence to the debtor. The question in the present case, therefore, is, whether the Registrar was justified in coming to the conclusion that the

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resolutions were passed, not *bonâ fide* by the creditors as creditors, but out of motives of kindness to the debtor. There is an affidavit on the one side which states the belief of the person who made it that these resolutions were passed out of motives of kindness to the debtor, and there is an affidavit on the other side that that was not so. But we must look at the facts before the Registrar, and see whether he was not justified in coming to the conclusion to which he did come. The case here is that the debtor had practically no assets; he had no prospect of being able to pay 1*s.* in the pound, and then a resolution is passed that 1*s.* in the pound is to be paid in one month, and no security is to be given for its payment. For whose benefit could such a resolution have been passed? If you assume that he had no prospect of paying the 1*s.*, of what advantage to the creditors could that resolution be? It is plain that it could not be of any advantage to them, and that the only person who could benefit by it was the debtor. It might benefit him by giving him a month before he could be made bankrupt by an adverse creditor. When the Registrar found that the only person who could benefit by the resolution was the debtor, when he found that an appeal had been made to the pity of the creditors on account of the debtor's wife and family, and on account of a young firm of solicitors in which his son was a partner, and when he found that the resolution could be of no benefit to the creditors, it seems to me that it was a sensible conclusion to come to, that the creditors, in passing the resolution, could only have been actuated by kindness to the debtor, and not by the belief that they were doing anything for the benefit of the creditors. I think that the Registrar came to the only sensible conclusion, and that the case is within the rule that a resolution not *bonâ fide* passed for the benefit of the creditors is void, and ought not to be registered.

JAMES, L.J.:—

The appeal will be dismissed with costs.

Argument.

R. T. Reid, for the appeal of the bank:—

The Registrar had no power to order a new meeting to be sum-

moned. There was no informality in the first meeting—no informality in the way in which the resolution was passed. There had been no accident, no mistake on the part of the debtor, which rendered the meeting in effect no meeting. The creditors came to a deliberate final determination, which has failed of effect only because they were actuated by motives which the Court, in the interest of the dissentient minority, regards as improper. To such a state of facts the principle of *Ex parte Cobb* (1) and *Ex parte Gibbs* (2) does not apply. There was no such informality as would have prevented the registration of the resolutions if no dissentient creditor had opposed. It is not a case where it was impossible that the creditors could pass a valid resolution.

Marten, Q.C., and *J. G. Laing*, for the debtor, were not called upon.

JAMES, L.J.:—

I am of opinion that the Registrar had a right, in the exercise of his judicial discretion, to allow the creditors to be summoned to a fresh meeting, not in the interest of the debtor, but to consider whether it was for the benefit of the creditors to have something else than an administration in bankruptcy. The only thing to be now considered is whether it was for the benefit of the creditors that that should be done. The creditors having come to a resolution which we have held to be void, what ought to be done under the circumstances? In *Ex parte Gibbs* it was held that the Court (and that includes the Registrars as well as the Judges) had power to allow another "first meeting" to be called where, through some accident or mistake on the part of the debtor, no valid resolution had been or could be passed; where the meeting was held so as not to give the creditors an opportunity to determine one way or the other, whether for liquidation or composition. I think the principle of that decision applies to the present case, and it seems to me to come clearly within the spirit of what I said, if not within the very words which I used, in *Ex parte Cobb* (3): "I can conceive that where a first meeting is shewn to have been no meeting at

(1) Law Rep. 8 Ch. 727. (2) Law Rep. 10 Ch. 382.
(3) Law Rep. 8 Ch. 727, 729.

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all, for instance, from the absence of the proper advertisements, it might be the duty of the Court to direct a fresh first meeting to be held." What I then said was adopted in *Ex parte Gibbs* (1), and the principle of the decision appears to me to apply to the present case, where the circumstances have prevented any valid resolution or determination being come to by the creditors. In such a case I think it was within the power of the Registrar to direct a fresh first meeting to be summoned.

Judgment, Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. In *Ex parte Cobb* (2) Lord Justice *James* expressed an opinion that if the votes of the creditors had been validly taken at a meeting, and they had refused to pass a resolution in favour of a liquidation or composition, the Registrar had no power to direct a fresh meeting to be held merely because the debtor thought he could induce them to change their minds. Lord Justice *Mellish*, in *Ex parte Gibbs*, was dealing with a case in which a valid resolution had not been passed at a meeting by reason of some accident or mistake on the part of the debtor. We have now to deal with a case in which the mistake has been on the part of the creditors, not on the part of the debtor. Lord Justice *Mellish*, in *Ex parte Gibbs*, used the expression, "some accident or mistake on the part of the debtor," because in that case the debtor had made a mistake in mixing together in his statement his joint and separate debts and assets. But it seems to me that the reasons Lord Justice *Mellish* gave there for considering that another "first meeting" should be held where there had been an accident or a mistake on the part of the debtor, apply equally where, as here, there has been a mistake on the part of the creditors.

Brett, J.A.

BRETT, J.A.:—

Unless there is some authority to the contrary, I can see nothing unreasonable in allowing a fresh meeting to be called; on the contrary, it appears to me most reasonable to do so; but if the matter is concluded by authority, we are bound by it. *Ex parte Gibbs* decided the matter, and there does not seem to me to be an

(1) Law Rep. 10 Ch. 382. (2) Law Rep. 8 Ch. 727.

authority to the contrary. It was there said that if at the first meeting the creditors have come to a valid determination, either to pass no resolution or to pass a particular resolution, then no fresh meeting can be ordered for the purpose of seeing whether they have changed their minds. But, if no valid determination has been come to at the first meeting, if by some accident or some mistake on the part of the debtor a valid determination has not been come to, then a new "first meeting" may be ordered. What Lord Justice *Mellish* said in that case was confined to the particular state of facts then before him. But I can see no objection to adding to what he said these words: "or if by reason of some mistake on the part of the creditors, or from any other cause, no valid resolution has been or could be passed, the Court may order a fresh meeting to be summoned." There being no authority against that proposition, and it appearing to me to be a perfectly reasonable one, I do not see that the Registrar had not power to order a fresh meeting, nor that he has not properly exercised that power.

Solicitors for Debtor: *Terrell & Honey.*

Solicitors for Bank: *Dobinson, Geare, & Son,* agents for *Newbould & Gould, Sheffield.*

In re E. S—— (A SUPPOSED LUNATIC).

Lunacy—Costs where Party is found not Lunatic.

A petition was presented for an inquiry as to the state of mind of Miss *S.* The medical visitor, by direction of the Court, saw her, and he made a report shewing that the case was one for inquiry. She was, however, when the inquiry took place, found by a jury to be of sound mind.

The Court was satisfied, on the evidence before it, that the Petitioner had not presented the petition of his own accord, but that the proceedings originated with the Petitioner's solicitor, who induced the Petitioner to lend his name, and after the inquiry gave him an undertaking to indemnify him against costs:—

Held, that no costs ought to be given to the Petitioner, but that as the case was one calling for inquiry he ought not to be ordered to pay costs.

Statement.

ON the 8th of June, 1876, a petition was presented by *H. Redfearn* for an inquiry as to the state of mind of Miss *S.* The

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In re E. S—— (A SUPPOSED LUNATIC).

Statement.

Court, on the 27th of June, directed that the medical visitor should report on the case, and after he had made his report the petition was put into the paper again on the 8th of July. The report was such as in the opinion of the Court to make an inquiry proper, and the alleged lunatic insisting on a trial by jury, an inquiry before a jury was directed. The inquiry took place, and on the 6th of October the jury found the alleged lunatic to be of sound mind without hearing any evidence on her behalf.

Redfearn now presented a petition praying that the costs of the original petition, of the inquiry, and of the present petition, might be paid out of the estate of the alleged lunatic, who on her part presented a cross petition, asking that all the costs might be paid by *Redfearn*.

Two witnesses deposed to *Redfearn's* having said to them on the 6th of October, after the verdict, that he had been induced to sign the petition by *Auty*, the solicitor who acted for him in the matter; that he never thought Miss *S.* insane and never said so, but that he thought she had a great deal of property for an old lady like her to manage, and ought to have somebody to assist her; that when *Auty* brought him the petition he signed it without looking at it, and had now made *Auty* give him a written agreement to pay all the costs. They further deposed to *Redfearn's* having told them that he had not seen the alleged lunatic for upwards of two years, and having further said, "I ought not to have to pay the costs. *Auty* ought to pay them. He came to me—I did not go to him. It is his action. I can prove that to you in a minute. If it had been my action I should have gone to my own solicitors, and my solicitors are *Rodgers & Thomas*." Another witness deposed to *Redfearn's* having said that he signed the petition at *Auty's* request, without reading it over and without knowing exactly what he was signing, and that he had nothing to do with the business beyond lending *Auty* his name.

The agreement by *Auty* to indemnify *Redfearn* against costs was produced, and bore date the 6th of October, 1876.

Redfearn, by affidavit, stated that before presenting the petition he had had conversations with *Auty*, and had expressed his readiness to sign a petition; that *Auty* brought the petition and read it over to him, and that he unhesitatingly and voluntarily signed

it, believing the alleged lunatic to be of unsound mind; that he had repeatedly seen her during the last two years before signing the petition, and was well aware of her state, and that there was "no agreement whatever" between *Auty* and himself that *Auty* should indemnify him as to the costs until after the verdict, when, being afraid that he might have to pay costs, he asked *Auty* for an indemnity. He contradicted generally the statements made by the above-mentioned witnesses, but did not allege in his affidavit that he had of his own accord commenced the proceedings.

Statement.

Auty, by affidavit, deposed to having been consulted on the 19th of May, and again on the 2nd of June, by two other relatives of the alleged lunatic, who considered her state of mind to be such that something ought to be done, but objected to presenting a petition, and said they would call again. He went on to say that they did not call again, and that on the 9th of June he saw *Redfearn*, with whom he had had previous conversations on the matter, and read the petition to him, and that *Redfearn*, who had before expressed his willingness to sign it, did then sign it.

W. W. Karslake, for *Redfearn*:—

Argument.

There was good ground for presenting a petition, and though the alleged lunatic has been found sane, the Petitioner will be allowed his costs out of the estate: *In re F*—— (1).

Bagshawe, Q.C., and *G. C. Price*, for the alleged lunatic:—

We say that these proceedings were set on foot by the solicitor for his own benefit, that the Petitioner did not really start them, and that there was an understanding from the first, of which the memorandum of the 6th of October is evidence, that *Redfearn* was not to be liable to *Auty* for costs. The case is analogous in principle to *Attorney-General* v. *Skinners' Company* (2), where an information was taken off the file because the solicitor had indemnified the relator against the costs. A similar principle was applied in the case of *In re Jones* (3). The Court looks with great disfavour on solicitors carrying on suits at their own risk: *Hawkins'* Pleas of the Crown (4); *Cockle* v. *Whiting* (5). The proceedings, then,

(1) 2 D. J. & S. 89.
(2) C. P. Coop. 7.
(3) Law Rep. 6 Ch. 497.
(4) Chap. 83, s. 30.
(5) 1 Russ. & My. 43.

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having failed, the Petitioner ought to be ordered to pay costs, or at all events ought not to receive any, for it is impossible to consider that a petition thus got up was *bonâ fide* presented with a view to the benefit of the alleged lunatic.

Karslake, in reply.

Judgment. James, L.J.

JAMES, L.J. :—

It is very important, in dealing with this question, that we should not lay down any rule or establish any precedent which on the one hand should discourage proper applications to the Court for the protection of unfortunate persons who from the state of their minds may require the protection of the Court, and they require very often perhaps protection against their relatives quite as much as against any other persons; and on the other hand we ought not to give too much encouragement to speculative petitions presented for the purpose of putting profit into the pockets of solicitors. Bearing both those considerations in mind, we are of opinion that the proper order in this case is not to make the Petitioner pay the costs of the inquiry, because after the medical visitor's report and the master's report, it seems to be a case which justified to some extent an inquiry and investigation. On the other hand, as the solicitor was the person who started the whole thing, who went and got the Petitioner, and who provided the Petitioner, as his agent or his nominee, to come before the Court, evidently with a view to getting the profits which would have resulted if the verdict of the jury had been otherwise, we think that as he took the chance of profit so he also must bear the chance of loss, and that it would not be right to allow him any of the costs which have been incurred. There will be no order on either petition.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

Solicitors: *Pitman & Lane; Pilgrim & Phillips.*

In re NATIONAL FUNDS ASSURANCE COMPANY.

C. A. 1876 Dec. 6, 13.

Practice—Time for Entering Appeal—Time for Appealing from Winding-up Order—Rules of Court, 1875, *Order* LVIII., *rr.* 2, 4, 8, 9, 15—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 124.

An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation when the office is closed, then before the next day of the sitting of the Court, otherwise the Respondent will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time.

The time within which an appeal from an order on a petition to wind up a company under the *Companies Act*, 1862, must be brought is twenty-one days.

Statement.

ON the 29th of July, 1876, an order was made by the Master of the Rolls to wind up the *National Funds Assurance Company*. The Petitioner was a policy-holder. On the 11th of August, 1876, the company gave notice of appeal. The notice stated that the Court would be moved on the 16th of August, or so soon thereafter as counsel could be heard, that the winding-up order might be rescinded and the petition dismissed with costs. The Appellants took no steps to have the appeal set down until the 16th of November, 1876, and then the officer of the Court of Appeal refused to set it down, on the ground that it was too late. On the 18th of November the company applied *ex parte* to the Court of Appeal for an order to set down the appeal, and the Court ordered that it should be set down, reserving, however, to the Respondent at the hearing the benefit of any objection. The appeal was now in the paper for hearing.

Argument.

Ince, Q.C., and *Seward Brice*, for the Appellants.

Chitty, Q.C., and *C. H. Turner*, for the Petitioner, took the preliminary objection that the appeal had been entered too late, Order LVIII., rule 8. The notice of motion falls to the ground unless it is set down by entering it in the list for hearing. It ought to have been set down at the latest by the first day of

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Argument.

the Michaelmas sittings, whereas it was not set down until the 18th of November.

Ince, Q.C., and *Seward Brice*, for the Appellants:—

Under the old practice a winding-up order was appealed from by means of a petition. The petition was presented and answered, and then took its place in the list. Now Order LVIII., rule 2, provides that all appeals are to be brought by notice of motion. Rule 15 prescribes a limit of time within which an appeal must be brought, and our appeal was brought within the three weeks' limit. So that, if that limit applies to an appeal from a winding-up order, which we should contend that under rule 9 it does not, we were strictly in time. Rule 8 provides that appeals must be set down in a particular way, but fixes no limit of time within which this is to be done. A notice of appeal may be given for any day, provided that sufficient notice is given so as to comply with rule 4.

Eddis, Q.C., *Morgan*, Q.C., *Bagshawe*, Q.C., *Jencken*, *H. Burton Buckley*, and *C. G. Church*, for other parties.

Judgment, James, L.J.

JAMES, L.J.:—

I think that this appeal was not entered in time. Rule 15 provides that appeals must be brought within certain limited times, the reason for the limitation obviously being that appeals should not be kept hanging over for an indefinite time. An appeal from an interlocutory order must be brought within twenty-one days; an appeal from a final order within a year, unless by special leave of the Court the time is extended. Rule 2 prescribes the mode in which an appeal is to be brought, viz., by a notice of motion by way of rehearing, and then rule 8 prescribes the way in which the appeal is to be set down or entered. The notice of the appeal is to be taken to the officer of the Court of Appeal, and he is to enter the appeal. It appears to me that unless this is done before the day named in the notice for the hearing of the motion, or, if the day named fall in a vacation when the office is closed, before the next day on which the Court is sitting, the appeal cannot be placed in the paper for hearing. Before the day for the hearing

the Appellant ought to be ready, and in order that he may be ready the appeal must have been brought to the officer of the Court to be set down in the list of appeals. If the old practice as to the setting down of appeal motions has been abrogated, the same result is in substance effected by the new Rules. I think, therefore, that this appeal was entered too late, and it must be dismissed.

BAGGALLAY, J.A.:—

Judgment, Baggallay, J.A.

I am of the same opinion. An appeal cannot be heard until it has been set down, and it would be absurd to suppose that, when the time within which an appeal may be brought has been strictly limited, the Appellant should be able, by not setting his appeal down, to keep it hanging over his opponent's head indefinitely. I am disposed to think that the true construction of rule 8 is that the appeal must be set down before the day named in the notice of motion for the hearing of the appeal, or, if the day named is in a vacation, before the next day on which the Court is sitting. But if that be not so, and no express provision has been made by the Rules as to the time for setting down an appeal, then the case is governed by the note at the commencement of the Rules, that, "where no other provision is made by the Act or the Rules, the present procedure and practice remain in force." And under the old practice in the Court of Chancery, if an appeal motion was not set down in the list before the day mentioned in the notice of motion, or before the next day on which the Court sat to hear appeal motions, the Respondent was entitled to have it dismissed as an abandoned motion.

BRETT, J.A.:—

Brett, J.A.

Those persons who have not had the responsibility of drawing the new Rules are very apt to think that the framers of them have forgotten a great number of things. I do not think that is a correct inference in the present case. I think that no time is fixed by rule 8 for the entry of an appeal, because it was impossible that any time could be fixed. The Rules apply to what I may call the Common Law Divisions of the Court as well as to the Chancery Division, and it was practically impossible to fix a

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time which would apply to all the cases which might occur. But the object of the Rules was to follow, as far as practicable, the practice of the old Court of Chancery. The question we have now to decide is, not whether this appeal has been brought in time, but whether it ought not to be considered as having been abandoned, because it was not entered in time. The only question is as to the construction of rule 8. That rule mentions no time within which an appeal must be entered. What is the result of that? Why, that we are driven back to the old practice of the Court of Appeal in Chancery with regard to appeal motions, and that practice, as the Registrar has told us, was this:—The Appellant gave a notice of motion for a particular day. He might name any motion day he pleased. But the practice was to set down the appeal motion in a list for hearing, and if before the day which the Appellant had named in his notice as the day on which he intended to move the appeal had not been set down in the list, the Respondent was entitled to have it treated as an abandoned motion and dismissed accordingly. That old practice still remains. The appeal must be set down before the day named in the notice of appeal, or, if the day named is in a vacation, before the next day on which the Court is sitting. The Court, no doubt, would have power to enlarge the time for setting down an appeal if some special ground was shewn for so doing, but we are not now dealing with any case of that kind.

JAMES, L.J. :—

The appeal will be dismissed with costs.

Statement.

On the 8th of December, 1876, some of the shareholders in the company gave a new notice of appeal from the winding-up order. On the 9th of December the Court of Appeal, on an *ex parte* application, ordered the appeal to be entered, reserving to the Respondents the benefit of any objection. On the 11th of December the Court gave the Appellants leave to serve notice of motion for the 13th of December to advance the hearing of the appeal, and to stay the proceedings under the winding-up order pending the appeal.

Upon the opening of the motion the Court desired the question to be argued whether the notice of appeal was in time according to the rules.

Ince, Q.C, and *Seward Brice*, for the Appellants:—

Order LVIII., rule 9, of the Rules of Court, 1875, is in substance the same as sect. 124 of the *Companies Act*, 1862 (1), under which it was held, in *In re Universal Bank* (2), that a petition of appeal from a winding-up order might be received after the expiration of three weeks, Lord *Cranworth*, L.C., expressing an opinion, in accordance with the decision of Vice-Chancellor *Kindersley* in *In re Anglo-Californian Gold Mining Company* (3), upon the construction of sect. 33 of the *Winding-up Act*, 1849 (12 & 13 Vict. c. 108), that sect. 124 applied to orders made under an existing order to wind up, and not to orders on the original petition. Since that decision it has been laid down in the text-books that the limit of three weeks fixed by sect. 124 did not apply to an appeal from the original winding-up order. It would be a great hardship if it did, for shareholders may not hear of the winding-up order till long after the three weeks have expired. It could not have been intended by rule 9 to alter the effect of sect. 124, and, as a matter of construction, there is no reason for saying that this has been

(1) Section 124 of the *Companies Act*, 1862, provides that "Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any Court having jurisdiction under this Act may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the Court appealed from, unless such time is extended by the Court of Appeal."

Order LVIII., rule 9: "The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the *Companies Act*, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under rule 15."

Rule 15 fixes twenty-one days as the limit of time for appealing from an interlocutory order.

(2) Law Rep. 1 Ch. 428.

(3) 1 Dr. & Sm. 628.

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Argument.

done. The words of the rule and of the section are substantially the same.

Chitty, Q.C., and *C. H. Turner*, for the Petitioner:—

We contend that, even if the cases cited are binding authorities as to the construction of sect. 124, still the general words in rule 9, "any other matter not being an action," are sufficient to include an appeal from a winding-up order. Under these words orders made upon petitions under the statutory jurisdiction of the Court, *e.g.*, on petitions under the *Trustee Relief Act*, would be included, and such orders frequently involve questions of equal importance with those which are involved in decrees made in suits or actions. It would be most mischievous if a winding-up order could be appealed from at any time within a year after it was made, when any number of proceedings had been taken under the order.

The interests of shareholders are protected by the statutory advertisements. And, as to the construction of sect. 124, *In re Universal Bank* (1) is not a binding authority. All that was done there was that, upon an *ex parte* application, the Lord Chancellor directed his own secretary to receive a petition of appeal from a winding-up order after the expiration of three weeks from the making of the order. There is no trace of the appeal having been ever heard, and at the hearing the objection would have remained open to the Respondents. *In re Anglo-Californian Gold Mining Company* (2) related to a different Act of Parliament.

Whitehorne, for the official liquidator.

[During the argument their Lordships consulted the Registrar and one of the Chief Clerks as to the practice under sect. 124.]

Ince, in reply:—

Rule 9 deals with several kinds of appeals, and carefully separates appeals under the *Companies Act*, 1862, from the others, and deals with them in words equivalent to those of sect. 124. The framers of the rule must be taken to have known what had been decided as to the construction of sect. 124.

(1) Law Rep. 1 Ch. 428. (2) 1 Dr. & Sm. 628.

JAMES, L.J.:—

Now that the case has been fully argued, and our attention has been called to all the rules and to the decided cases, I am of opinion that the limit of time for appealing from a winding-up order is now fixed at twenty-one days, unless the time is extended by special leave of the Court of Appeal. If I had had for the first time to construe sect. 124 of the *Companies Act*, 1862, I should have entertained no doubt whatever that the limit of three weeks fixed by it applied to the original order for the winding-up equally with all other orders made in the course of the winding-up. It is, indeed, difficult to conceive why the winding-up order should be subject to a different rule from that which applies to all other orders made in the winding-up; all convenience, all justice, are in favour of imposing a short limit on the time within which it may be appealed from. For when once a winding-up order has been made, all the business of the company, all dealings by and with the company, are suspended; everything relating to the company is placed in a condition which demands that there should be the utmost promptitude if it is sought to reverse the order. It is said that we are bound by the decisions of Lord *Cranworth* and Vice-Chancellor *Kindersley* as to the construction of sect. 124, the words of which it is said are repeated in rule 9. But when we look at the ground of Vice-Chancellor *Kindersley's* decision, and see what was really the matter which was then before him, it is clear that his decision is no authority for the construction which it is said ought to be put upon sect. 124. He came to the conclusion, upon the words of sect. 33 of the Act of 1849, that it applied only to the rehearing of orders made by the Master of the Rolls or a Vice-Chancellor on an appeal from the Master, and his decision cannot be pushed beyond the grounds upon which it was based. Then the case before Lord *Cranworth* was only an *ex parte* application, the point was not argued by counsel on the other side, and the Lord Chancellor merely gave a direction to his own secretary to receive the petition, thus leaving the question entirely open to be argued after the petition had been received. No one has been able to produce a single reported case in which the question was argued or made the subject of judicial decision. I

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think, therefore, that we are not bound by the decision of Lord *Cranworth*. We have asked the Registrar and the Chief Clerk whether they are aware of its having been the practice under the Act of 1862 to allow appeals from winding-up orders to be brought after the expiration of three weeks, and they have told us that they do not know of any decision to that effect, or of any such practice. In the absence, therefore, of any established practice, I think that we are in no way precluded from putting what appears to me to be the natural and proper construction upon the words of sect. 124 and rule 9.

Baggallay, J.A.

BAGGALLAY, J.A.:—

The Legislature have thought it right to fix by rule 15 different limits of time for appealing from interlocutory and from other orders, and then by rule 9 they have prescribed that certain classes of orders shall be subject to the same limit of time as interlocutory orders. Three classes of orders are enumerated: 1, orders made in the matter of the winding-up of a company; 2, orders made in the matter of any bankruptcy; and 3, orders made in any other matter not being an action. We have nothing to do now with the second class. The question is whether an order to wind up a company is included in either the first or the second class. If this question depended on the words of rule 9 alone, I think there could be no doubt that an order to wind up a company was an order made in the matter of the winding-up of the company. It is said, however, that the words of sect. 124 (which are in effect the same as those words of rule 9 which deal with class 1) have been made the subject of judicial decision. But the only decision referred to is that in *In re Universal Bank* (1). If, indeed, the Lord Chancellor had then had before him an appeal from a winding-up order, or from the refusal of the Vice-Chancellor to make a winding-up order, I should certainly have felt myself to a great extent bound by his decision. But no such case was then before him; the only question before him was whether a petition of appeal from a winding-up order should be received by his secretary. There is no doubt an indication of his

(1) Law Rep. 1 Ch. 428.

opinion that the limit of three weeks did not apply to an appeal from the original winding-up order, but all that he did was to give the Appellants an opportunity of being heard in the presence of their opponents. The only other case referred to was one before Vice-Chancellor *Kindersley*, but that turned upon the words of a section in the Act of 1849, which are not the same as those of sect. 124 of the Act of 1862, and I am bound to say that, as at present advised, I do not think I should have come to the same conclusion. But, in the present case, I think that, if an appeal from a winding-up order is not included in the first class of appeals mentioned in rule 9, it is included in the third class, and therefore, *quâcumque viâ*, this appeal ought to have been brought within twenty-one days.

BRETT, J.A.:—

It is argued on the one side that an appeal from a winding-up order is within sect. 124 of the *Companies Act*, and also within rule 9, and it is argued on the other side that such an appeal is within neither. It is said that it is not within sect. 124, because a judicial decision of Lord *Cranworth* has put a construction upon that section by which we are bound. If that decision is to be taken to have been founded upon the prior decision of Vice-Chancellor *Kindersley*, I think we should be at liberty to doubt its correctness, because there is no necessary analogy between the construction which should be given to one Act of Parliament containing one set of words, and that which should be given to another Act of Parliament containing quite another set of words. *A priori* it would seem to me to be a strange construction of the words to say that an order for the winding-up of a company is not an order made in the matter of the winding-up. For the reasons which have been already given by the Lord Justice, I think that the case of *In re Universal Bank* (1) is not to be taken as a decision of the Lord Chancellor in favour of such a construction, and with the greatest possible respect for his opinion, I must say that I cannot agree with it. If the case is governed by sect. 124 of the *Companies Act*, 1862, then I think that the appeal ought to

(1) Law Rep. 1 Ch. 428.

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have been brought within twenty-one days, and if that is so, the case falls also within the first branch of rule 9. But if it is not within sect. 124, and therefore, also, not within the first branch of rule 9, then I think that the construction of rule 9 which Mr. *Chitty* has contended for is the right one, and that the third branch of the rule applies. If the winding-up order is not an order made in the matter of the winding-up, it is an order in "a matter not being an action." Another consideration of great force, I think, is this, that if an order for the winding-up of a company is not within rule 9, that would be the only order made in a matter not being an action to which the limit of twenty-one days would not apply, for orders made under the statutory jurisdiction of the Court—under the *Trustee Relief Act*, for instance—are clearly within rule 9. I think, therefore, that Mr. *Chitty* is right in the dilemma which he put, that the case is either within sect. 124 or within the third branch of rule 9.

Ince, Q.C., then asked for special leave to appeal, on the ground that this was the first case under the new practice, and that the Appellants had been misled by the old decisions.

JAMES, L.J.:—

That is not a sufficient ground. The appeal will be dismissed with costs.

Solicitors: *W. Curtis; Edward Beall.*

In re BARRY RAILWAY COMPANY.

C. A.
1876
V.-C. M.
July 29.
C. A.
Dec. 13.

Deposit by Railway Company—Bond for Completion of Railway—Railways Abandonment Act, 1869 (32 & 33 *Vict. c.* 114), *s.* 5—*Warrant of Board of Trade—Debt incurred on Account of Promotion of the Company.*

A solicitor was employed in the promotion of a railway and in obtaining the Act for its incorporation. He was then appointed solicitor of the company, and was employed in obtaining two other Acts by which the scheme was amended and fresh powers granted. The undertaking proved abortive, and the railway was never constructed. A warrant of the Board of Trade was obtained under the *Railways Abandonment Act*, 1869, for the abandonment of the railway, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the company:—

Held (affirming the decision of *Malins*, V.C.), that the costs of the solicitor incurred in getting up the company, and, after its incorporation, in obtaining the subsequent Acts, were costs incurred on account of the promotion of the company within the 5th section of the *Railways Abandonment Act*, 1869, and ought not to be paid out of the bond.

4 L T D 4

Statement.

BY the *Barry Railway Act*, 1865, which received the Royal Assent on the 5th of July, 1865, the *Barry Railway Company* was incorporated for making a railway between the *South Wales Railway* and *Barry Island* in *Glamorganshire*.

By the *Barry Railway Alteration Act*, 1866, the company was authorized to abandon the railway authorized by the former Act and to construct another line instead of it.

By the *Barry Railway Extension Act*, 1866, the company was authorized to construct a branch railway in connection with the railway authorized by the *Barry Railway Alteration Act*.

The company also obtained further powers by a certificate of the Board of Trade dated the 15th of July, 1867.

By their Acts the company were empowered to issue 16,600 shares of £10 each.

The company, however, were unsuccessful in raising the necessary capital, only 1339 shares having been subscribed for, of which 1165 were taken by Mr. *R. F. L. Jenner*, a large landowner in the neighbourhood, and no part of the railway was finished for traffic.

Mr. *Jenner* and Captain *Fredericks*, another promoter of the

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company, signed the bonds conditioned for the completion of the railways, in order to release the deposits which had been paid in when the bills were brought into Parliament.

On the 5th of August, 1874, Mr. *Jenner* obtained a warrant from the Board of Trade, under the *Railways Abandonment Act*, for the abandonment of the undertaking. This warrant contained the usual clause declaring that "this warrant is granted upon the condition that the money secured by the bonds conditioned for the completion of the said railways, or for payment of money in default thereof, should be applied as part of the assets of the said company."

The company was ordered to be wound up in November, 1874; the liabilities were about £7000, and the assets about £900. In answer to the advertisements for creditors, Mr. *Reddish*, the solicitor of the company, claimed to prove for the sum of £2698 9*s*. 4*d*. for professional services. Mr. *Jenner* objected to the payment of this sum out of the money payable under the bonds, on the ground that the debt claimed had been incurred on account of the promotion of the company; and eventually a summons was taken out by Mr. *Jenner* before Vice-Chancellor *Malins* to decide the question.

It appeared from the evidence that Mr. *Reddish*, who had been for some years the solicitor of Mr. *Jenner*, was engaged in the formation of the company and the promotion of the undertaking, which was expected to increase greatly the value of Mr. *Jenner's* estate; and that he was appointed solicitor of the company as soon as it was incorporated, and continued to act as such solicitor in procuring the subsequent Acts. But there was a conflict of evidence as to the character in which he acted in the formation of the company. He stated in his affidavit that he was retained by Mr. *Jenner* to give his services in getting up the company and obtaining the Act, on the distinct understanding that if the Act was not obtained Mr. *Jenner* should reimburse him his expenses out of pocket, but that if the company was formed, his costs and expenses were to be paid by the company; and he said that he was in no sense a promoter of the company, and looked for no profit from it except for his professional services. After the formation of the company £6000 were paid to him by order of the

directors, and the sum now claimed was partly the balance due to him for his services in the formation of the company, and was partly due for his services in procuring the subsequent Acts of 1866, and other professional work for the company after its formation.

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Statement.

Mr. *Jenner*, on the other hand, stated that Mr. *Reddish* promoted the undertaking with a view to personal benefit from it, and had repeatedly assured Mr. *Jenner* that he, Mr. *Jenner*, would be under no responsibility in respect of the costs. It appeared that Mr. *Jenner* had already incurred an expense amounting to £12,328 in attempting to float the undertaking.

The summons was heard before Vice-Chancellor *Malins* on the 29th of July, 1876 (1).

Glasse, Q.C., and *B. B. Rogers*, appeared for Mr. *Jenner*.

H. F. Bristowe, Q.C., and *H. C. Deane*, for the representatives of Captain *Fredericks*.

J. Pearson, Q.C., and *Colt*, for Mr. *Reddish*.

Malins, V.C., after referring to the facts, continued:—

Judgment, V.-C. M.

This bond being given long before such securities were made general assets, it is perfectly clear that Mr. *Reddish* did not and could not possibly originally have looked to the money to be obtained under it to pay his bill of costs. Such bonds were not contemplated originally as securities which would give the solicitors, or the engineer, or any body connected with the company in any way, a right to demand from the obligor a single penny. It is a

(1) The 5th section of the *Railways Abandonment Act* (32 & 33 Vict. c. 114), on which the argument principally turned, is as follows:—

"If the warrant for the abandonment was made on condition that the money deposited as security for the completion of the railway, or the stocks, funds, or securities in which the same is invested, or the money secured by any bond conditioned for the completion of the railway, or for payment of money in default thereof, should be applied as part of the assets of the company, the Court may, if it think fit, direct that such money, stocks, funds, and securities shall not be applicable for the payment of any debt or part of a debt which, regard being had to what is fair and reasonable as between all the parties interested, under all the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company."

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most important consideration that this bond could not when given have been made available to secure a single penny to any creditor of this railway company. Then there is passed the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), with certain clauses as to abandonment, which begin with clause 31. It provides that the *Railways Abandonment Act*, 1850, shall extend and apply to all companies authorized to make a railway by Act of Parliament passed before the then present session, according to provisions therein set forth, of which the only material ones are those contained in sub-sect. 3. [His Lordship then read that sub-section, and continued:—] Therefore the Act of 1867, for the first time, turns the bonds into assets of the company, if the Board of Trade think fit to make them so. They are at liberty to refuse the order for abandonment except on the condition that the bonds be made part of the assets of the company, and when the order for the abandonment of the railway was made, though not a sod was turned, the Act had been obtained at an enormous expense, the project having cost Mr. *Jenner* not less than £12,000, from which he never derived any benefit. But the order having made the bonds assets for payment of the debts of the company, it let in all kinds of persons upon the obligor of the bonds, as to some of whom it was felt that they never justly had become indebted, and ought not to be called upon to pay, and therefore in the *Railways Abandonment Act*, 1869, sect. 5 was inserted in order that promoters and persons similarly engaged should not have this general right to resort to persons who were also promoters, and to call upon them to pay debts incurred to the promoters. I understand the Legislature to mean that if there are solicitors, engineers, railway contractors, or any persons of this description joining with landowners in one common scheme to obtain the railway, inasmuch as they are all doing that which is most profitable to themselves, if it succeeds it is not fair that any one member of the class short of the whole should have the right to resort to any particular member of the body because that person happens to have given a bond such as this, unless it is just and equitable in the opinion of the Court, having regard to all the circumstances as between all the parties interested. I must say I am very sorry, considering all the unfortunate circumstances of this case, that

Mr. *Reddish* has thought fit to persevere in this claim. The project has been unfortunate and disastrous to Mr. *Jenner* and Captain *Fredericks*, but I cannot consider that it has been so to Mr. *Reddish*, for I find he has actually received from Mr. *Jenner* a sum of £4952 in hard cash for a purpose which has been a complete failure, and in a case in which I cannot help thinking that if the bills had been duly taxed and considered that sum ought to have been an ample remuneration for everything done by Mr. *Reddish*. He says he was giving credit to Mr. *Jenner*, whose private solicitor he was, but if so why did he make out all the bills to the company and refrain from suing Mr. *Jenner*, or taking a single step to oblige him to pay the money. There are three objections taken by Mr. *Jenner* and Captain *Fredericks* to the payment of this bill: first, that the money was expended in promotion; secondly, that Mr. *Reddish* contracted with Mr. *Jenner* from the beginning that he was not to incur any responsibility, but the assets of the company were to be looked to. On that subject there is a contradiction, but I think that the weight of evidence is overwhelming in favour of the view of Mr. *Jenner*. If there was no such engagement, why has Mr. *Reddish* refrained all these number of years from taking any step to enforce payment, and until an order to wind up the company is obtained. The remaining ground of objection is that Mr. *Jenner* says that it was a contract between them from the beginning that he was not to be called on. [His Lordship then read and commented on the evidence on this point, and concluded that there was such an agreement as suggested. He then continued:—]

If the evidence were even more conflicting on this subject, the balance would be turned by the circumstance that from the 23rd of October, 1867, close on nine years ago, to this claim being preferred, after the order of abandonment was obtained, there is not one tittle of evidence that any demand was ever made on Mr. *Jenner*, nor even a letter written to him demanding any further payment from him.

Then the only remaining question is, whether the money has been paid for promotion or not. I understand the Legislature to draw a distinction between the general debts of a company, such as tradesmen's debts for goods supplied, and those incurred on

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account of promotion, as I am of opinion was the case with respect to the moneys said to be owing to Mr. *Reddish*. I am further of opinion that it would be most unfair and most unreasonable between all the parties, under all the circumstances, that indirectly, by means of this bond, Mr. *Jenner* should be called upon to pay the money to Mr. *Reddish* which he was under no obligation to pay to him directly; and if the obligation remains it will not be interfered with by the order I propose to make. If Mr. *Reddish* has any right of action against Mr. *Jenner* I do not interfere with it in the slightest degree. It will be for Mr. *Jenner* to decide whether he will avail himself of the lapse of time by pleading the statute. But to say that, now that he has lost his right of action, he is by this indirect means, and by my aid, to get from Mr. *Jenner* that which he cannot get by an action from him directly, is, in my opinion, entirely out of the question. I think that *In re Brampton and Longtown Railway Company* (1) is entirely applicable to the present case. I refer to the particular passage, where the Vice-Chancellor says (2): "To approach the question, therefore, the first point to be settled must be, whether the debts which are now claimed on behalf of *Dodds & Hendry* or *Bolton & Jones* are debts on account of the promotion of the company. As a matter of fact, can there be any doubt about that? Parliamentary agents who it appears had no clients but the company, not then existing, the company in prospect, as the correspondence shews, were active and energetic promoters of the company. Every shilling of expense which has been incurred by these Parliamentary agents has been incurred on account of the promotion of the company, and for no other purpose in the world." So I say in this case: the whole of this bill of costs has been expended and incurred for the promotion of the company, and no other purpose in the world, and for these reasons I come to the conclusion that the bond is not to be made available for the payment of these debts, and the order will be in conformity with the summons.

C. A. From this decision Mr. *Reddish* appealed, and the appeal came on to be heard on the 13th of December, 1876.

(1) Law Rep. 10 Eq. 613. (2) Law Rep. 10 Eq. 620.

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J. Pearson, Q.C., and *Colt*, for the Appellant:—

The sole question is whether these debts were incurred on account of the promotion of the company, because they were certainly incurred on account of the company, and if not incurred on account of the promotion of the company, the bond was, under the *Railways Abandonment Acts*, made liable to pay them. It is only debts for services performed before the incorporation of the company which can be considered as being incurred on account of the promotion of the company. This was the ground of the decision in *In re Brampton and Longtown Railway Company* (1). Almost all these expenses were incurred since the incorporation of the company. If, therefore, there is any fund available for payment of the debts of the company, these expenses are payable out of it, and the statute has made the bond available for that purpose. Mr. *Jenner*, who was one of the most active promoters of the company, is certainly not the person to complain of having the fund made liable to this claim.

Glasse, Q.C, and *B. B. Rogers*, for Mr. *Jenner*, were not called on.

H. F. Bristowe, Q.C., and *H. C. Deane*, for the personal representatives of Captain *Fredericks*.

Hull, for the liquidator of the company.

Judgment, C. A.
James, L.J.

JAMES, L.J.:—

I am of opinion in this case that the order of the Vice-Chancellor ought to be affirmed. A great deal has been addressed to us in argument to shew that a company once incorporated can contract debts, and, amongst other debts, can contract a debt with its own solicitor for work done by him as solicitor, and that the solicitor is entitled to be paid for such work out of the assets of the company. It was hardly necessary to have elaborated a proposition so very simple as that. The question here is whether, having regard to these Acts, certain costs which have been incurred by the solicitor on behalf of the company ought or not to be paid out of very peculiar assets which have been created under the provisions of the

(1) Law Rep. 10 Eq. 613.

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Railways Abandonment Act. The circumstances are these: a bond was given by two gentlemen for a certain sum of money, and by one of the sections of the Act these bonds would stand as part of the assets of the company. If it had been simply a debt, it would have been assets of the company, and Mr. *Reddish*, who was a creditor of the company, would have been entitled to be paid. But the Legislature in framing the Act thought that it would be most unjust that such bonds should be assets as between a man who happened to be connected with the promoting of the company and those who might become the sureties of the company. They would be only two out of several other persons connected with the scheme. It would be very hard on those two men, as they had been induced, on behalf of themselves and all others joining the company, to enter into a bond, that they should be actually called upon to pay that bond for the purpose of paying the legal debts due from the corporate body to people who were substantially in the same boat as themselves. Of course it was intended to leave these people to stand exactly as they were before.

Then, the only question we have to consider is, What is the meaning of the words in this Act? What is the meaning of the words which state that this especial fund so created "shall not be applicable to the payment of any debt or part of a debt which, regard being had to what is fair and reasonable to the parties interested under the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company"? It is not the payment of any debt or part of any debt "which shall have been incurred in the promotion of the company," but "which, regard being had to what is fair and reasonable between all the parties interested under all the circumstances of the case, appears to the Court to have been incurred on account of the promotion of the company."

Now what is the meaning of the words "incurred on account of the promotion of the company"? I quite agree, if it had been a company like the *Great Western Railway* or the *Midland Railway Company*, which had been established and was applying for fresh powers, it could not be said that anything done by the company itself was done on account of the promotion of the company. But

is the promotion of a company confined to the preliminary proceedings under the Act? Is it confined to obtaining the existing Act incorporating the company? I am of opinion that it is not so confined. Here the Act was passed, but nothing really done under it. Another Act was obtained to try if the public would come into it. Then a third Act was obtained; nothing being actually done, no capital substantially paid, and nothing but expense incurred. But one step after another, one application to Parliament after another, is made for the purpose of trying to get an actual working and efficient company. It appears to me that it would be putting a most narrow construction upon the provision, which, from its words, was intended to receive a most liberal construction, to say that the promotion of the company ended when the first Act was passed for the incorporation of the company.

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I think, therefore, "regard being had to what is fair and reasonable as between all the parties interested under all the circumstances of the case," the Vice-Chancellor was quite right in coming to the conclusion that Mr. *Reddish's* bill of costs were costs incurred on account of the promotion of the company. The appeal must be dismissed with costs.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. By virtue of the warrant of the Board of Trade, the money secured by Mr. *Jenner's* bond became applicable as part of the assets of the company. *Primâ facie*, as part of the assets of the company, it would be liable to the payment of all the debts of the company, but the Legislature has thought it right, when money originally of other parties has been handed over in this way and dealt with as part of the assets of the company, to vest in the Court the opportunity of saying whether or not, in the opinion of the Court, having regard to all the circumstances of the case, a particular class of debts should or should not be included as debts to be paid out of the assets. That class of debts is described as "debts which, regard being had to what is fair and reasonable as between all the parties interested under the circumstances of the case, appear to the Court to have been incurred on account of the promotion of the company." In the course of

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his judgment the Vice-Chancellor has gone very fully into all the circumstances of this case, and has expressed an opinion, in which I am bound to say I fully concur, that this debt, in respect of which the present application is made, was a debt incurred on account of the promotion of the company. Having regard to all the circumstances of the case, it would appear to me to be anything but fair and reasonable that this particular debt claimed by Mr. *Reddish* should be paid out of this particular portion of the assets of the company.

Brett, J.A.

BRETT, J.A.:—

Two propositions of law have been attempted to be supported on behalf of Mr. *Reddish*, the first of which is that this sect. 5 is not applicable to the debt of any one who is not in every sense a promoter of the company. Another is that it is not applicable to any debt incurred after the Act has been passed constituting the company. It seems to me that the section is advisedly much larger; it is applicable to a person who cannot in every sense be a promoter, and it is applicable to debts which may be incurred after the first constitution of the company. I think it is not necessary to determine in this case whether it can be applicable to any debt incurred after the promotion of the company, in the real sense, is ended, and the company is, in a real sense, finally formed as a company, as, for instance, if it has become a working company. But it seems to me that it is applicable to a case where although an Act has been passed constituting the company, yet the company is not, in a real sense, started or finally formed, but there is something to be done in order to start it as a reality. In such a case, although the debt may not be in strictness said to be incurred on account of the promotion of the company, yet regard being had to what is fair and reasonable as between all the parties, that is, as between the persons who have become liable under such bond, as well as those claiming payment, it appears to me that it was intended to give the very largest powers to the Court that could be, and to meet precisely such a case as this is alleged to be, namely, where a gentleman of property has a solicitor who knows an engineer, and that solicitor and that engineer, for the purpose of making themselves the solicitor

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and engineer of the company, persuade that gentleman that it is for the good of his property and for his advantage that a company should be formed, so that they, as between him and themselves, are the real persuaders, the getters up, the inventors, and the carriers out of the company, he being a tame gentleman, who for a time is obliged to find credit.

The question remaining is, whether there is any evidence on which the Vice-Chancellor could properly come to the result at which he arrived in this case. Now it does seem to me that the very contention on the part of the Appellant which is raised in this case shews that it is within the meaning of the statute; for if Mr. *Reddish* did not intend to look to Mr. *Jenner* only and as his solicitor, what was he doing? He was intending to look to the company. It is argued that the company, after all, might not have made him their solicitor. But one must be blind as a mole if one does not see that he never would allow anybody to belong to the company who was not pledged to make him the solicitor of the company when the company was formed. It is the very case which was intended to be met by the section.

Solicitor for Appellant: *J. Proffitt.*
Solicitors for Respondents: *Tilleard & Co; J. B. Batten.*

In re LAMOTTE, A LUNATIC.

C. A.
1876
Dec. 16.

Lunatic Trustee—Vesting Order—Lands in Ireland—Trustee Act, 1850, *ss.* 3, 54, 56—*Trustee Extension Act*, 1852, *s.* 10.

The surviving trustee of property, consisting partly of land in *Ireland*, having become lunatic, an order was made upon a petition instituted both in Lunacy and in the Chancery Division, appointing new trustees and vesting the Irish land in them.

Statement.

THIS was a petition by the *cestuis que trust* under the marriage settlement, dated the 26th of June, 1852, of Mr. and Mrs. *Rogers*, for the appointment of new trustees and a vesting order.

The trust property in part consisted of real estate in *Ireland*

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which was vested in the trustees in trust for sale. *G. C. Lamotte*, the surviving trustee, having been found lunatic, this petition was presented both in Lunacy and in the Chancery Division, praying for the appointment of new trustees, and also asking, among other things, that the Irish real estate might be vested in the new trustees when appointed.

Argument.

E. S. Ford, for the Petitioner:—

The *Trustee Act*, 1850, extends the Chancery jurisdiction to vesting Irish land, while the Lunacy jurisdiction does not so extend: *Trustee Act*, 1850, ss. 3, 54, and 56; *Trustee Extension Act*, 1852, s. 10; *In re Davies* (1), and *Re Hewitt's Estate* (2). But now this Court, acting in both jurisdictions, can make the order prayed.

Judgment.

JAMES, L.J.:—

We have clear jurisdiction in Lunacy to appoint new trustees in place of the lunatic. We have, by special order, been appointed additional Judges of the Chancery Division for the purposes of applications connected with lunacy, and, having both jurisdictions, we can at once make the vesting order prayed.

BAGGALLAY, J.A., and BRETT, J.A., concurred.

Solicitors: *Warry, Robins, & Burges.*

(1) 3 Mac. & G. 278. (2) 6 W. R. 537.

(1) See Sup. Ct. of Jud. Act 1873 (36 & 37 Vic. c. 66) S. 57

HOPE *v.* INTERNATIONAL FINANCIAL SOCIETY.

C. A.
1876
V.-C. B.
Nov. 9.
C. A.
Dec. 18.

Company—Ultrà vires Act—Power to Directors to buy up Shares—Trafficking in Shares—Reduction of Capital—Clause of Forfeiture of Shares of Shareholder taking Legal Proceedings against Company.

A company, having 150,000 shares issued and half paid up, passed a special resolution that the directors should have power to apply the company's assets in purchasing from any shareholders willing to sell, any number of shares not exceeding 100,000; and that such shares should not be re-issued by the directors without the authority of a general meeting. The company had no power under its memorandum of association or articles to purchase or deal in its own shares or accept surrenders:—

Held (affirming the decision of *Bacon*, V.C.), that the scheme was *ultrà vires* and invalid, being either an attempt to reduce the capital of the company without complying with the provisions of the *Companies Act*, 1867, ss. 9–13, or else a trafficking in the shares of the company which was not authorized by the memorandum of association.

Dictum in *Teasdale's Case* (1) questioned.

A clause in the articles of association provided that the shares of any shareholder who directly or indirectly commenced or threatened any action, suit, or other proceeding against the company or the directors should be forfeited on payment to him of the full market value:—

Held, that the clause was invalid.

Statement.

THIS was a motion by the Plaintiff, suing on behalf of all the shareholders other than the directors, for an injunction to restrain the directors of the *International Financial Society, Limited*, from acting upon a resolution purported to be carried on the 24th of August, 1876, and from purchasing or taking any steps for purchasing any shares of the Defendants' society with money belonging to the society.

The society was registered in May, 1863, with a nominal capital of £3,000,000 in 150,000 shares of £20 each, which was afterwards reduced to £1,500,000 in 150,000 shares of £10 each on which £5 had been paid.

By the 170th clause of the articles of association it was provided that "The shares of any shareholder who directly or indirectly carries on, commences, supports, or threatens any action, suit, or other proceeding at law or in equity against the company, or

(1) Law Rep. 9 Ch. 58.

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against the directors or any of them in their capacity of directors, may, and notwithstanding the pendency of any such proceeding, and whatever be the ground or alleged ground of any such proceeding, be, on the recommendation of the board, and with the sanction of a general meeting, absolutely forfeited for the benefit of the company; but in every such case the company shall, within fourteen days after the forfeiture, pay to him the full market value of the shares at the time of the forfeiture thereof, the value in case of difference to be settled by arbitration."

In a report issued to the shareholders on the 12th of August, 1876, and intended to be submitted to an extraordinary general meeting of the shareholders to be held on the 24th of August, 1876, attention was called to the circumstance that there were two sections of shareholders in the society, one desiring to withdraw from the society, and for that purpose suggesting a winding-up. The directors, however, did not approve the plan of winding up, on the ground of its expense, and because it was contrary to the wishes of the great body of the shareholders.

Another course which had been suggested was, that so much of the assets of the society as could be prudently spared should be divided proportionally among the shareholders; but this plan was considered to be open to the objection that it would not relieve the shareholders from their liability, but, on the contrary, would increase it by the amount per share so returned.

The plan which the directors therefore recommended was to apply a considerable part of the cash and easily convertible assets of the society to purchasing on behalf of the society the shares of those who wished to retire altogether from the undertaking. They thought that the disposable funds would be sufficient to purchase from 80,000 to 100,000 shares out of the 150,000 shares issued. In order that the purchase might be made with perfect fairness to all parties a maximum price (above which no tenders would be accepted) would be announced by circular to all the shareholders. A certain period would be allowed for sending in tenders stating the number of shares offered and the price that would be accepted for them. If the number tendered should not exceed the number to be purchased, all those at or under the maximum would be accepted, but if there were any excess the tenders would be

accepted in the order of price, beginning at the lowest, and, if necessary, making an allotment *pro ratâ* among those tendering at the highest price accepted.

On surrender to the society of the shares tendered and accepted the purchase price would be at once paid in cash.

The directors also stated that they proposed to tender in common with other shareholders, but in order not to stand in the way of the shareholders at large they would give a preference to the tenders made by other proprietors, and would withdraw their own tenders wholly or in part, as occasion might require for that purpose.

At an extraordinary meeting held on the 24th of August, 1876, special resolutions were passed, which were confirmed on the 21st and registered on the 23rd of September, 1876, authorizing the board to purchase from any shareholders willing to sell such number of the shares not exceeding 100,000 as the board should think fit, subject to certain terms and conditions (not material to be mentioned); providing that the shares so purchased or surrendered should not be re-issued by the board without the authority of a general meeting, and authorizing the board to do all things necessary or expedient for the purpose of carrying these resolutions into effect.

These resolutions were passed with only four dissentients, of whom the Plaintiff was one. He was the holder of five shares, and also claimed to be a creditor to a considerable amount, and had previously commenced an action against the company and others to enforce his claim. The Plaintiff commenced the present action on the 17th of August, 1876, before the meeting was held, and after the first of the two meetings he applied to the Vacation Judge for an injunction, but the motion stood over to November by consent to allow the shareholders to confirm and register the resolutions passed at the first meeting, which was accordingly done; the Defendants undertaking not to carry them into effect until the motion had been heard.

At a subsequent meeting of the shareholders a resolution was passed purporting to forfeit the shares of the Plaintiff in accordance with the 170th clause in the articles, and the market value of the shares was tendered to him, but not accepted by him.

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HOPE v. INTERNATIONAL FINANCIAL SOCIETY.

The motion came on before the Vice-Chancellor *Bacon* on the 9th of November, 1876.

Kay, Q.C., *Hemming*, Q.C., and *Cutler*, for the Plaintiff.

Cotton, Q.C., Sir *H. Jackson*, Q.C., and *Macnaghten*, for the Defendants.

Judgment, V.-C. B.

BACON, V.C. :—

It always happens in cases like the present there are considerable difficulties, and the constitution and intention of the company are to be kept in view. This company, having been established a good many years, and being in a somewhat embarrassed state, and being involved in litigations, and for some reasons or other finding it necessary to change the course of their business, and in fact to diminish their capital, resort to the contrivance which is contained in these resolutions, and they do it in the frankest manner possible. The report which is sent to the shareholders represents no doubt what were the circumstances of the company, and what were their intentions. What they announce is that they had considered the plans which had been proposed to them for meeting the wishes of those shareholders who at various times had expressed their desire to withdraw from the society without the sacrifice which a pressure of the sales on the market would involve. Then they state that the board have arrived at a definite conclusion on the subject, which they submit to the shareholders for their approval.

[His Lordship then referred to the statements made in the report, and the scheme proposed by the directors, and continued :—]

Now what is that, in the plain sense of the word, but a diminution of the capital by applying the assets, or so much of them as they think fit, for the purpose of buying out the shareholders who may be desirous of retiring, and at the same time avoiding the inconvenience of winding up? Is there any authority in the articles—is there any power contained in the Acts of Parliament, or either of them, except under the conditions which are imposed by the Act of 1867, which enables the company to divert the money which is subscribed by the shareholders for the purposes of

carrying on the business, from the ordinary purposes for which it was subscribed, and for which the shareholders are liable, and apply it in buying up the shares of the shareholders who wish to withdraw? I am at a loss to find any such. *Teasdale's Case* (1) and the other authorities which have been referred to do not in the slightest degree justify that. All that case decided is, that the Court, finding that what had been done had been done in good faith and without any intention of diminishing the capital of the company, and that the company had made certain arrangements for the cancellation of shares, the Court, after the length of time that had elapsed, did not think fit to disturb the transaction. Beyond that there is no authority to be derived from *Teasdale's Case*, or from any other that I know of. The law I take to be plain, and covered by many decided cases, that it is not competent to a company to take the moneys which have been subscribed for its capital for the purpose of buying up the shares of that company. Now that is what is done in this case; that is what the Plaintiff here desires to prevent. And he says, I think justly, that the general meeting could not by their resolution do that which is not contemplated by the articles or by the memorandum of association, and which has no authority but the authority which is given by the resolution then passed. The Plaintiff thereupon asks that the Defendants may be restrained from acting upon this resolution, and from purchasing any shares of the Defendant society with money belonging to the society. The argument on the part of the Defendants has failed to convince me that there is any authority either in the articles or to be derived from the nature of the transaction which justified them in placing out of their control moneys which, among other purposes, were directly applicable to the payment of their debts, and thus letting off those shareholders who desired to withdraw. If they could do that, it would be easy for companies not intending to act honestly—though I have no doubt this company did intend to act honestly, and I would not be understood to express a suspicion or doubt upon that subject—by proxies and voters at a general meeting, to dispose of the whole of the assets of the company in favour of selected shareholders, exhaust the whole of the funds, and leave the creditors unpaid, or leave them to

(1) Law Rep. 9 Ch. 54.

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get what they could by whatever means were open to them. That will be the result of this case if the money required to purchase these shares should exhaust the whole of the resources of the company. What state are the creditors in? I cannot disregard their interests. It is true I have before me no complaint made by creditors, nor do I for that purpose consider the fact asserted by the Plaintiff, that he is a creditor. But he is a shareholder also, and, as a shareholder, it is his right, and it is also his duty, to see that the moneys of the company are applied to their legitimate purpose. Having regard to the articles and the memorandum of association, to the Act of Parliament, and to the cases which have been decided, I cannot think that it is a legitimate application of these assets of the company, which are not wanted, as it seems, for any present purposes of business, to expend them in the purchase of those shares. In my opinion that is an unlawful thing for the company to do, and although this question can only be decided properly at the hearing, I think, upon the balance of convenience, it will be more convenient, and I feel it will be much more just, that the proceeding which was about to be taken under the resolution should be suspended until the rights of the parties can be more deliberately and conclusively determined.

Then with regard to the 170th article, I cannot conceive that the meaning of the article is, that if the company holds a general meeting and sanctions a most unlawful thing, a most unlawful and dishonest thing, and a shareholder complains of that and takes proceedings, he is precluded by the 170th article, which strips him of his shares and deprives him of any right in respect of his shares. His rights as a member of the constitution still remain, and, as I have said before, I think his duty also requires that he should interfere to prevent an improper application of the funds of the society.

C. A. From this decision the Defendants appealed, and the appeal came on to be heard on the 18th of December, 1876.

Argument. *Cotton*, Q.C., *Davey*, Q.C., and *Macnaghten*, for the Appellants:—

The scheme proposed by the directors and adopted by the company was perfectly *bonâ fide*, and no fault can be found with it

unless it can be shewn that it was beyond the powers of the company to make such an arrangement. The only questions are, therefore, first, whether if the power so to deal with the shares had been inserted in the articles of association, the scheme would have been good; and, secondly, whether it made any difference that the power was given to the directors by a special resolution passed subsequently. On the first point it has been repeatedly held that a power given to the directors in the articles of association to purchase and accept surrenders of the shares is good: *Thomas' Case* (1); *Wright's Case* (2); *Snell's Case* (3); *Teasdale's Case* (4). In the last-mentioned case the Lord Justice *James* is reported to have said (5): "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares."

[JAMES, L.J.:—Is there any authority for my observation, so far as it relates to the power to purchase shares?]

Thomas' Case goes distinctly to that extent. If the power would have been good if inserted in the articles, it was equally good when given by special resolution properly confirmed. The power may be given and exercised at the same meeting: *Campbell's Case* (6).

The arrangement in the present case is represented by the Respondents as being either a reduction of the capital of the company, and therefore void, because the provisions of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), were not complied with, or else a trafficking by the company in its own shares. It was neither. If the shares were not re-issued it was not a reduction of the capital of the company; it was only a reduction of the assets: and there is nothing *ultrà vires* in that. The assets of a company are always reduced whenever an improvident bargain is made, but the Court will not interfere to restrain a diminution of assets, or it would have to restrain all imprudent speculations. The word "capital" is an equivocal term, and in one sense every forfeiture of shares is a reduction of capital, but a forfeiture has never been held for that

(1) Law Rep. 13 Eq. 437.
(2) Ibid. 12 Eq. 331.
(3) Ibid. 5 Ch. 22.
(4) Law Rep. 9 Ch. 54.
(5) Ibid. 58.
(6) Ibid. 1, 19.

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reason to be *ultrà vires*. If the company were to become insolvent and to be wound up, the shareholders who were released would remain liable to the creditors for a year; there is therefore no injustice to the existing creditors. But in fact it was intended to re-issue the shares, but this was to be done only upon a special resolution of the company. It is a very usual thing for the articles of association to provide that only half or some other proportion of the number of shares fixed by the memorandum shall be issued without a special resolution; and that provision has never been held a reduction of capital, or a violation of the 12th section of the *Companies Act*, 1862.

Nor was this scheme a trafficking in the shares. There was no intention of making a profit by purchasing and then re-issuing the shares; and such a purchase as the present has never been considered by the *Stock Exchange* as a violation of their rule against a company buying and selling its own shares.

We also contend that the Plaintiff has no *locus standi*, for by taking legal proceedings against the company he has rendered his shares liable to forfeiture under the 170th clause of the articles of association, and this forfeiture has been completed.

[JAMES, L.J.:—We cannot listen to that argument. Any stipulation that a shareholder shall not appeal to a Court of Justice must be bad.]

At all events, as the Plaintiff stands almost alone in his opposition to the wishes of the other shareholders, the Court will refuse to listen to him: *In re South Barrule Slate Quarry Company* (1).

Kay, Q.C., *Hemming*, Q.C., and *Cutler*, for the Plaintiff:—

The transaction was *ultrà vires*, and it was the duty as well as the right of each individual shareholder, if he objected to it, to endeavour to prevent it. In some of the cases the Court has been reluctant to disturb a concluded transaction at the instance of a dissentient shareholder, on the principle that *fieri non debet, factum valet*. But here we applied to restrain the directors from carrying out the scheme directly the report was published. We say that this scheme was not authorized by the articles of association. The resolution did not profess to alter the articles, nor was any notice

(1) Law Rep. 8 Eq. 688.

Argument.

given that the meeting was called with that object, which ought to have been done if an alteration was intended: *Lawes' Case* (1). But even if the meeting had formally and legitimately altered the articles, it could not have sanctioned such a scheme as this. It is compared to the common case of forfeiture of shares for default in payment, it was no such thing; it was a scheme for buying at a higher price than the market price the shares of a whole class of shareholders out of the assets of the company. If they meant to extinguish the shares, they were diminishing the capital of the company in a manner not authorized by the *Companies Act*, 1867, ss. 9–13. None of the cases cited support the validity of such a power as this. They all relate to the surrender and forfeiture of shares for special reasons with a view to re-issuing them, and none of them cover the case of a surrender of shares with the object of reducing the capital on which shareholders are liable. If, on the other hand, the directors intended to re-issue these shares at some future time, they could only do so by purchasing them in the name of a trustee and re-selling them. This would be trafficking in shares, which the company was not authorized to do, and the unanimous consent of the whole body of shareholders could not make the act valid: *Ashbury Railway Carriage and Iron Company* v. *Riche* (2).

[They were stopped by the Court.]

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion in this case that the order of the Vice-Chancellor ought to be affirmed. Mr. *Kay*, it appears to me, has succeeded in placing his opponents on the horns of a dilemma. Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares and therefore a reduction of the capital of the company. But it appears to me, and did appear to me from the first, and the argument has strengthened me in that opinion, that, looking at the transactions and the substance of them, it is really—however honestly it may have been intended by these parties, who, I daresay, thought no harm would come of it—a scheme to divide the assets

(1) 1 D. M. & G. 421. (2) Law Rep. 7 H. L. 653.

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between the shareholders under the guise of the company's purchase of the shares—a device, in fact, to evade the provisions of the law regulating the reduction of capital. That is, as it appears to me, what it really comes to. The Vice-Chancellor was right in saying that that cannot be done, either in the form of additional articles or otherwise. Why the Legislature thought fit to prevent the reduction of capital, I do not know. There may have been very good reasons for it. The Legislature has made express provisions for preventing the reduction of capital in these limited companies, except in a particular manner and with particular safeguards for the protection of trade. That has not been done here. As it seems to me, there was an attempt to do it in another mode, and without those safeguards.

We have been referred to several cases in which a power to accept surrenders of shares, and the more common case of a power to declare a forfeiture of shares and to deal with those forfeited, have been held to be good. I am reported to have said in one, *Teasdale's Case* (1), that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally, and to a small extent it may be said to diminish the capital. Of course the diminishing of the capital would not be the object of an act of that kind, and it would not be the intention of the Legislature to interfere with ordinary matters of business of that kind. Those cases seem to me to afford no kind of colour for a transaction like this, in which out of 150,000 shares 100,000 shares might have been extinguished. I think, without reference to what passed at the meeting, the resolutions are, on the face of them, *ultrà vires*, but I will refer to what took place at the meeting to this extent, that, independently of anything said or done by the solicitor or by the directors there, it seems to me very questionable, at least, whether

(1) Law Rep. 9 Ch. 58.

any resolution passed at any meeting of shareholders would be a valid resolution if it was intended to result in their dividing the assets between them, or in their receiving some pecuniary consideration as a consequence of the vote which they were then passing. The appeal must be dismissed with costs.

BAGGALLAY, J.A. :—

Judgment, C. A. Baggallay, J.A.

I am of the same opinion. It appears to me that the resolutions which were passed on the 24th of August, and which were confirmed on the 21st of September, were in substance resolutions for the reduction of the capital of the company. No doubt it might have been done with a view to the winding-up of the company in preference to the ordinary process of winding up, but they were in substance resolutions to reduce the capital of the company which then consisted of £1,500,000 to an extent not exceeding £1,000,000. Now I am of opinion that at the time when those resolutions were passed there was no power to reduce the capital of the company except by pursuing the course pointed out by the Act of 1867. The Act which, until the Act of 1867 was passed, was in force was that of 1862, and this expressly provided that no alteration should be made by the company in the conditions contained in the memorandum of association except those which were previously mentioned, which included the increase of the capital of the company, but did not include its diminution. And, indeed, in 1868 that course seems to have been pursued by this company, for when it was determined then to reduce the capital of the company from £3,000,000 to £1,500,000, having first of all varied the articles of association in a form which provided that the company might from time to time, by special resolutions, modify the conditions contained in the memorandum of association so as to reduce its capital, it then proceeded by a second resolution to resolve that the capital of the company should be reduced from £3,000,000 to £1,500,000. The resolutions on that occasion appear to have been regularly registered and confirmed in manner pointed out by the Act of Parliament. That is the way, and I think the only way, in which at the present time the capital should be reduced. I was anxious during one portion of the argument to ascertain

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whether the point was still open with regard to the intention to apply for a confirmation of what had been done, but I was distinctly answered that the Appellants rested their case on the present occasion on the ground that what was intended to be done by those resolutions was not a reduction of the capital.

Teasdale's Case (1) and *Campbell's Case* (2) have been referred to in the course of the argument, but they do not appear to me really to have any material bearing on the case now under consideration. In *Teasdale's Case* the resolutions were only for the surrender of certain shares in the capital of the company in exchange for another issue of shares in the capital of the same company, and the resolutions were assented to by all the shareholders, and it is so expressly stated in the case. The amount of capital uncalled up was increased by the effect of the resolution, so that the creditors really suffered no injury from it, and the transaction sought to be impeached, as far as regards the particular individual, had taken place seven years before, and everybody had acted upon the faith of it. I think there were sufficient grounds in that case to come to the decision which was arrived at. The facts in *Campbell's Case* were somewhat different, for in that case, and also in *Hippisley's Case*, which was disposed of at the same time, each of the parties to the transaction had accepted the shares on the faith of the resolution, and did not take proceedings to escape from liability for several years afterwards. That appears to me plain from Lord *Selborne's* observations in the course of his judgment, in which he says (3): "It appears, however, to us, upon the evidence as it now stands, that, as a matter of fact, the *Bank of Hindustan* did really and *bonâ fide* acquire and purchase (by a title which, though originally defective as against some of the shareholders in the *Imperial Bank*, was in the end confirmed so as to become unimpeachable), the business and property of the *Imperial Bank*." It was confirmed by the actions of the parties, who thought at the time to escape from liability. On the whole, I think the conclusion arrived at by the Vice-Chancellor is correct, and that this appeal must be dismissed.

(1) Law Rep. 9 Ch. 54. (2) Law Rep. 9 Ch. 1.
(3) Law Rep. 9 Ch. 18.

BRETT, J.A.:—

Although these resolutions be made to have the force of articles by reason of their being passed according to the provisions of the articles of association, they are void by reason of the 12th section of the *Companies Act*, 1862, if they altered or modified any condition of the memorandum of association, which is forbidden by that section. Now, it has been said that, even although some of these resolutions would have that effect, yet that others would not, and that the result ought to be that only a part of the resolutions should be declared void; but it seems to me that it would be wrong to consider these resolutions as distinct resolutions. They are, in effect, all one resolution for the purpose of producing a desired result, and they must be considered as a whole as if they were one article. Now, I think that the amount of capital which may be embarked in a company, and which amount is named in the memorandum of association, is a condition of the memorandum of association. So also is the kind of business which the company has to carry on. Both of these are conditions contained in the memorandum of association, and the alteration of either of those conditions is an alteration forbidden by the 12th section. Therefore the question comes to be, whether these resolutions, taken as a whole, if they were to have the effect of articles, would alter either the amount of capital which is named in the memorandum of association as the amount of capital which may be embarked in the business, or would alter the kind of business which the company in the memorandum of association was formed to carry on. Now, if these resolutions do amount to a resolution that the shares which are to be purchased are not to be re-issued, then if you assume them to be binding articles, no subsequent meeting could re-issue them, except for the words at the end of the second resolution. If they do amount really to a prohibition against a re-issue, assuming them to be binding articles, they bind the future members of the company just as much as the present.

Taking those to be the preliminary decisions to which we ought to come, I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is

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said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses; but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares, and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche* (1). That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association it was not allowed. If that, therefore, was the intention of this resolution, then it broke the rules, by enabling, or by forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished. It is true to say that the mere power to accept a surrender or a mere power of forfeiture does not alter the memorandum of association, because it is only accepting a surrender from one shareholder for the purpose of procuring another shareholder, or forfeiting the shares of one shareholder for the purpose of obtaining another shareholder; the amount of capital issuable, or which the company has power to issue, is not modified at all. But in this case, if these 100,000 shares are to be purchased in the way contemplated by these resolutions and are never to be issued again, then, instead of a capital of £1,500,000 being capable of being issued, only £500,000 would have been capable of being issued. Therefore the amount of capital which is named in the memorandum of association as the issuable capital is diminished from £1,500,000 to £500,000. It is true that the words of the memorandum of association are

(1) Law Rep. 7 H. L. 653.

said not to be intended to be altered, but that is not what is said in the 12th section. It does not say the memorandum of association may not be altered. It says that you may not alter the conditions contained in the memorandum of association, and if the amount of capital is one of those conditions, you may not alter that amount of capital. Therefore, if that be the meaning of the resolutions, they break the rule by altering the amount of capital which is the amount contained in the memorandum of association. That the resolutions must mean one thing or the other seems to me clear. It is true that if you read the words in one sense, it may be said that there is a power to re-issue, but, looking at the resolutions by themselves, and at the scheme of them, it seems to me wrong, and therefore impossible, to come to the conclusion that that was the real intention of the resolutions. The real intention was to diminish the amount of issuable capital, and that is an alteration of the capital named in the memorandum of association, and is a material alteration, therefore, of the memorandum of association.

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Solicitors for Appellants: *Bircham & Co.*
Solicitors for Respondent: *Kynaston & Gasquet.*

HALL *v.* EVE.

[1875 H. 59a.]

C. A. 1876 V.-C. B. *Nov.* 30. C. A. *Dec.* 3.

Practice—Pleading—Form of Reply—Rules of Court, 1875, *Orders* XIX., *rr.* 2, 4, 14, 20; XXIV, *r.* 2; XXVII., *rr.* 1, 2; *App. C., Forms* 6–24.

A Plaintiff is entitled to reply by traverse, confession and avoidance, or both combined.

12 Ch D. 790

Statement.

6 Ch D. 321

F. T. HALL, the Plaintiff in the action, claimed specific performance of an agreement dated the 5th of March, 1875, between the Defendants *W. Eve* and *G. Whiffin* of the one part, and the Defendant *Thomas Lane* of the other part, whereby *Eve* and *Whiffin* agreed to grant a lease of certain building land to *Lane* for ninety years, with an option to *Lane* of purchasing the freehold at a price

(1) See W.N. (1875) 211 II 350-1, 352, 374-380

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therein mentioned, before the 25th of December, 1875; and *Lane* covenanted with the lessors to build within twelve months certain houses on the premises.

The Plaintiff in his statement of claim alleged that *Lane* had transferred his interest to the Plaintiff, who gave notice of his intention to exercise his option of purchase, but that *Eve* and *Whiffin* refused to execute a conveyance to him.

The Defendants *Eve* and *Whiffin* by their statement of defence alleged that before the transfer of the agreement to the Plaintiff, the Defendant *Lane* had committed certain breaches of his contract which gave the Defendants *Eve* and *Whiffin* a right to put an end to the agreement; which they had accordingly done, and had commenced an action to recover the land from the Plaintiff.

The Plaintiff in his reply admitted some of the paragraphs in the statement of defence, and denied others; and he moreover pleaded that if (which he did not admit but denied) there had been any default or breach of the agreement on the part of *Lane*, the Defendants *Eve* and *Whiffin* had waived it; and as to the provision which was alleged to have been broken, he pleaded that if it had been broken by *Lane*, the Defendants were not entitled by reason of such breach to determine the agreement, for reasons which he stated. He also alleged concealment and false representation and want of equity; and lastly, he joined issue with the Defendants upon their statement of defence, except as to such of the allegations and statements as were thereinbefore admitted.

With the reply the Plaintiff also served the Defendants with notice of trial.

The Defendants *Eve* and *Whiffin* then moved before Vice-Chancellor *Bacon* that the reply delivered by the Plaintiffs might be set aside as irregular and erroneous in form and pleading, and that the notice of trial delivered at the same time might also be set aside as irregular.

The motion came on to be heard before Vice-Chancellor *Bacon* on the 30th of November, 1876.

Kay, Q.C., and *Horton Smith*, for the Defendants, relied on *Earp* v. *Henderson* (1).

(1) 3 Ch. D. 254.

Sir *H. Jackson*, Q.C., and *C. Browne*, for the Plaintiff.

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Judgment, V.-C. B.

BACON, V.C.:—

My notion of the Act of Parliament is that it was the intention of the Legislature to simplify proceedings as far as procedure goes, and to insist that parties to an action should have their issues pointed and distinct.

Here the Plaintiff has denied the truth of statements in the defence, and then pleaded that even if the defences be true, he is entitled to relief on various equitable grounds. All that ought to have appeared in his statement of claim. Such a mode of pleading, in my opinion, introduces all the evils which once prevailed in the Courts of Common Law.

I have no doubt that the pleading is erroneous. If any doubt be felt on the subject, it must be removed by some tribunal more authoritative than this.

The reply must be set aside, as well as the notice of trial. There will be leave given to the Plaintiff to amend his statement of claim; and the costs will be reserved generally on both sides till the hearing of the trial.

From this decision the Plaintiff appealed, and the appeal came on to be heard on the 20th of December, 1876.

C. A.

Sir *H. Jackson*, Q.C., and *C. Browne*, for the Appellant:—

Argument.

The Vice-Chancellor's judgment is based upon the authority of *Earp* v. *Henderson* (1), but that case is distinguishable from the present. That was a case in which there would have been a new assignment under the old system of pleading at Common Law; and as by Rules of Court, 1875, Order XIX., rule 14, no new assignment can now be made, it was necessary to introduce the new matter by amendment of the statement of claim. But in the present case under the old practice the new matter would not have been introduced by new assignment but by a special replication; and the same course is permitted now. The 2nd rule of Order XIX., which prescribes the course of pleading, puts no restriction upon the form of reply, and it is clear from Order XXIV., rule 2, that a reply may

(1) 3 Ch. D. 254.

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contain other matter besides a mere joinder of issue. The same conclusion may be drawn from Order XIX., rules 20, 21, and Order XX., rule 1. Moreover, in Appendix C. to the Rules several examples of special replies are given. It is far more convenient to meet the points in the defence as they arise than to anticipate them in the statement of claim.

Kay, Q.C., and *Horton Smith*, for the Defendants:—

This is an attempt to recur to the old system of special pleading, which it was the intention of the *Judicature Act* to abolish. If special replies are allowed the Defendants will be obliged to apply for permission to file a special rejoinder; whereas by amending the statement of claim, and, if necessary, the statement of defence, the whole of the case of the Plaintiff and of the Defendants will be conveniently placed before the Court. There is no need for the Plaintiff to anticipate the defence as in the old Chancery pleadings. The statement of claim may be at first quite simple, and may be amended to meet the defence. This is the method pointed out by the Order XXVII. It is true that examples are given in Appendix C. of special forms of reply, but some of them, for instance the 10th, 14th, 23rd, and 24th, apply to cases where there is a counter-claim or set-off, which is really in the nature of a cross-action; and as to the others, it is a matter of discretion with a Judge whether they should be allowed. It is observable that in the note to Form 9 the pleader is warned that the more convenient plan is to introduce such allegations into the statement of claim by amendment. In the present case the Judge has exercised his discretion, under Order XXVII., rule 1, to strike out this special reply, and the Court of Appeal ought not, without a strong reason, to interfere with such discretion: *Watson* v. *Rodwell* (1). *Earp* v. *Henderson* (2) is quite applicable to this case, and is directly in our favour.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

This case reminds me of a saying of the late Mr. *Jacob*, that the importance of questions was in this ratio: first, costs; second,

(1) 3 Ch. D. 380. (2) 3 Ch. D. 254.

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pleading; and third, very far behind, the merits of the case. The time employed in the argument of the present case has been wholly disproportionate to its importance. The question is this: the Plaintiff in his statement of claim says, "I have an agreement of which I am entitled to specific performance." The Defendant, by his statement of defence, says, "You are not entitled to specific performance, because you have committed breaches of the agreement and done certain things which entitled me to put an end to the agreement, and I have put an end to it." The Plaintiff, in his reply, says, "The facts you allege in your defence are not true, and if they were, they are things which you yourself induced me to do. It is, therefore, against equity that you should set them up against me." It is not questioned that a Plaintiff ought to be at liberty to say this, if it is true; the only question is, whether he is wrong in alleging it by a special reply. Now the Order XIX., rule 2, says that after the Plaintiff has delivered a statement of claim and the Defendant a statement of defence, set-off, or counter-claim, "the Plaintiff shall in like manner deliver a statement of reply (if any) to such defence, set-off or counter-claim." There is no limit that I can see as to what may be said in the reply, except that it must not be scandalous or irrelevant. The Plaintiff is left as much at liberty in his reply as in his statement of claim. In the present case the Plaintiff says, "The Defendant has waived his right." The Defendant says he ought to allege this by amending his statement of claim, not in his reply. Of course if the rules had so provided expressly, the Court would be bound by them; but as the rules have not so provided, it seems to me most illogical that the Plaintiff should have to do this. The rule says that the Plaintiff must make a statement of complaint, and the relief or remedy to which he claims to be entitled. It is no part of the statement of claim to anticipate the defence, and to state what the Plaintiff would have to say in answer to it. That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the Plaintiff used to allege in his bill imaginary defences of the Defendant, and make charges in reply to them. I am of opinion that, independently of the forms given in the Schedule to the Orders, on the plain meaning of the rule the reply is the proper place for

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meeting the defence by confession and avoidance; and that this reply does no more than that. The appeal must, therefore, be allowed.

BAGGALLAY, J.A.:—

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I am of the same opinion. The 2nd rule of Order XIX. points out the proper course to be pursued by the Plaintiff in his reply; and there is no limit in that clause to the generality of the words, no suggestion that they apply only to a simple reply. Then the 4th rule of the same Order says that pleadings must be concise, and that forms similar to those in Appendix C. may be used; and in the Appendix several forms of special replies are given. Mr. *Kay* referred to one of these forms, to which a note is added that the facts stated in that reply should in general be introduced by amendment into the statement of claim; and he argued from this, that, as a general rule, new facts ought to be introduced by such amendment, and not in the reply. I read the note differently. There are several forms of special reply, but this note is appended only to this one. And when we look at the nature of the claim, which is on a bottomry bond, and the facts stated in the form, we can easily see that in that particular case it would have been more convenient to have introduced the matter pleaded in the reply by amending the claim. So that, in my opinion, this exception rather confirms the proposition.

This construction of the rule is confirmed by Orders XXIV. and XXV. Rule 2 of Order XXIV. seems to say that no pleading subsequent to a reply other than a joinder of issue may be pleaded without leave of the Court; this implies that a reply may contain something which may render further pleading necessary.

Bramwell, J.A. BRAMWELL, J.A.:—

I am entirely of opinion that this appeal must be allowed. My judgment is certainly not influenced by any love of the old system of special pleading, which for a quarter of a century I did my best to get rid of. But at all events it was logical, and if the old system had now prevailed this answer of the Plaintiff to the Defendants' defence would properly have been made in the replication. The rule in pleading then was, that you should not leap

before you came to the stile. It may be a grave question how far pleadings ought to extend, and on this subject there were different opinions. Some persons thought there should be none at all, others would allow only a declaration, others would stop at the plea, others at the replication. I am inclined to think that those who framed these Orders intended that the parties should, as a general rule, go no further than the replication; but, as a matter of right, that the parties might go as far as that, and that the Plaintiff might reply specially, and might also at the same time deny such allegations in the plea as he might think fit. It would sometimes be very unjust if he were not at liberty to do so. Suppose a Defendant pleaded a release, the Plaintiff ought to be allowed to plead that he did not execute the release, and if he did execute it that he was induced to do so by fraud. It was manifestly the intention of the framers of the Orders that the pleading was to go as far as the replication. Under the old practice, if the Defendant desired to allege anything by way of confession and avoidance, in answer to the Plaintiff's reply, of which he desired to give evidence, he was obliged to allege it specially in his rejoinder; whether that is necessary now I do not say. If it is, leave to do so must be obtained. But with the reply it is different; in it the Plaintiff can and must allege such new matter if he relies on it. In the Appendix several instances of confession and avoidance in special replies are given; and I think, therefore, the Plaintiff may traverse the allegations made in the defence or confess and avoid them, or both. The 2nd rule of Order XXIV. appears decisive. It implies that the reply may be something else besides a simple joinder of issue, and it may be so even without leave of the Court. It amounts almost to a demonstration that the Plaintiff may both traverse and confess and avoid in his reply. But it was argued by Mr. *Kay* that this is a matter for the discretion of the Judge. I am not of that opinion. The 2nd rule of Order XIX. says that the Plaintiff shall deliver to the Defendant a statement of his complaint and of the relief to which he claims to be entitled. In the present case the fact that the Defendant had waived the alleged forfeiture was no part of the Plaintiff's complaint or of the relief which he claimed. His complaint is that the Defendant had broken the agreement, and the

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relief he prays is specific performance; and it seems to me that it would be out of place and illogical if this new matter of the replication were put into the statement of claim, and certainly the 2nd rule does not require that it should be. I cannot help thinking it would be a mischievous thing to anticipate a defence that may never be made. If the Plaintiff were to do this, he might also anticipate every form of defence, and that would lead to great length of pleading. It appears to me that an allegation that the Defendants had waived their right is much more cheaply, conveniently, and compendiously made in the reply than by amendment in the statement of claim.

Solicitor for the Plaintiff: *Theodore Barker.*
Solicitors for the Defendants: *Crook & Smith.*

C. A. 1877 Jan. 18.

Ex parte BRIGSTOCKE. *In re* BRIGSTOCKE.

Adjudication of Bankruptcy—Tender of Petitioning Creditor's Debt—Discretion of Judge to refuse to adjudicate—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 7, 8, 31.

4 Ch D 718, 720
15 Ch D 462
4 Ch D 38, 40

On the hearing of a petition for adjudication of bankruptcy, founded on default in appearance to a debtor's summons, after the debt and act of bankruptcy had been proved, the hearing was adjourned till the next day with the consent of the solicitor of the petitioning creditor, in order that the debtor might make arrangements to pay not only the petitioning creditor's debt, but also the debts of other creditors who were represented by the same solicitor. At the adjourned hearing the debtor tendered the amount of the Petitioner's debt only and costs, which were refused by the petitioning creditor. The Registrar accordingly made the order for adjudication:—

Held, on appeal, that the Registrar was right in making the order.

Semble, there may be cases in which the Court may refuse to make an order for adjudication, after a tender of the debt and costs, although the petitioning creditor refuses to accept them, and insists on his right to adjudication.

Statement.

THIS was an appeal from an order of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy, adjudicating Mr. *A. Brigstocke* a bankrupt.

On the 21st of October Messrs. *Standen & Co.* served a debtor's summons on Mr. *Brigstocke* for a debt of £100 which had been re-

covered against him in an action in the Exchequer Division. The debtor did not appear on the summons, and thereby committed an act of bankruptcy. Messrs. *Standen* accordingly, on the 9th of December, filed a petition for adjudication against him, which came on to be heard on the 20th of December. The debtor gave no notice of his intention to oppose the petition. When the petitioning creditors' debt and the act of bankruptcy had been proved, the solicitor for the debtor applied for an adjournment till the following day, which was consented to by the solicitor for the petitioning creditors. At the adjourned hearing the debtor's solicitor tendered to the solicitor for the petitioning creditors £150, which was sufficient to cover the debt and costs, but he refused to receive the money. Under these circumstances, the Registrar made the order for adjudication, and the debtor appealed from his decision.

Statement.

At the hearing of the appeal, Mr. *Leslie*, the solicitor for the petitioning creditor, was examined *vivâ voce* as to what took place before the Registrar. He stated that he had consented to the adjournment of the hearing of the petition to the following day on the express understanding that the debtor would be prepared the next day to make arrangements for the payment not only of the debt of the petitioning creditors, but of several other creditors for whom he was acting; and that on the following day he refused to accept the tender of the petitioning creditor's debt and costs because the other creditors' debts were not also paid.

Winslow, Q.C., and *Bucknill*, for the Appellant:—

Argument.

If a debtor pays or tenders his debt and costs before the order of adjudication is pronounced, he cannot be made bankrupt. Under the *Bankrupt Law Consolidation Act*, 1849, the filing of the petition was made the dividing line, after which no dealing with the bankrupt was good. After that time the petitioning creditor could not recover payment of his debt. But that has been altered by the present Act (32 & 33 Vict. c. 71). Now the order of adjudication is made the dividing line (sect. 31), and there is no reason why a petitioning creditor should not receive payment of his debt at any time before the order is actually made: *Ex parte Wier* (1). It

(1) Law Rep. 6 Ch. 875.

C. A. 1877 *Ex parte* BRIGSTOCKE. *In re* BRIGSTOCKE. Argument.

cannot be said that the petitioning creditor in this case "had notice of an act of bankruptcy available against the debtor for adjudication" within the meaning of the 94th section of the present Act, because the act of bankruptcy founded on the debtor's summons is not available against the debtor for adjudication at the instance of any person but the creditor who takes it out, and if his petition is dismissed no one can take advantage of it. In *Ex parte Boss* (1), which may be cited against us, the Chief Judge admitted that it was in the power of the creditor to accept payment, although he held that he could not be compelled to do so. The decision in that case is not binding on the Appeal Court. By sect. 7 of the present Act the *onus probandi* in the proceedings on the debtor's summons is thrown on the debtor; by sect. 8 the *onus probandi* in the proceedings on the petition for adjudication is thrown on the creditor, and he has to prove that a debt exists at the time of making the order, which he cannot do if the debtor can shew either a set-off or tender of payment. The same section gives discretionary power to the Judge, who "may dismiss the petition with or without costs as the Court thinks fit." The Court has, under sect. 72, the power to decide all questions of fact or law between the parties, and if it were to be held that under no circumstances a debtor could escape from a petition for adjudication, although ready and willing to satisfy all the creditors' claims in full, the grossest injustice would often be done.

Creed, for the petitioning creditors:—

The Judge has no such discretion to refuse an adjudication as is contended for by the Appellant. No doubt, if he saw that there was a fraud on the bankruptcy laws intended, he could exercise the right which is inherent in the Court to refuse the application, but in all other cases the 8th section is imperative, that if satisfied with the proof the Court "shall adjudge the debtor to be bankrupt." This was decided by *Ex parte Boss*, and that case has never been overruled. It would be very inequitable if it were otherwise. For it often happens that there are several creditors and only one takes out a debtor's summons, as a representative of the others, in order that the bankruptcy may enure for the benefit of all, and it

(1) Law Rep. 18 Eq. 375.

would be very hard if the debtor could get rid of the whole proceedings by tendering the debt and costs of the petitioning creditor only. That was the case here, and the adjournment was consented to on the express understanding that the debtor would arrange to pay both the petitioning creditor and the other creditors whom the solicitor represented. If the creditor had pressed for the order on the first day, the Registrar could not have helped making it, for the debtor had no *locus standi*, as he had given no notice of his intention to oppose the petition.

Winslow, in reply.

JAMES, L.J.:— Judgment, James, L.J.

I am of opinion that the order of the Registrar must remain. I will not say that there is absolutely an obligation on the Registrar to make the order for adjudication when the statutory requisites have been proved, but the debtor is willing and ready to pay the petitioning creditor's debt and costs. I can conceive a case, for instance, in which there has been a *bonâ fide* dispute about a debt, and the debtor chooses to fight the question out before the Registrar, instead of in an action; then the Registrar hears both sides and comes to the conclusion that the debtor owes, say £100, and the debtor then submits to the decision and offers to pay the debt and costs. In such case I think it would be very hard that a man should be made bankrupt who acts in that way, if he all along intended to pay the debt when it should be proved against him. It is not, however, necessary to decide that now. In the present case the requisites of the Act had been complied with, and I am satisfied that on the first day when the case came on to be heard the debtor did not intend and was not prepared to make a tender. He proposes an adjournment in order to make an arrangement to pay not only the petitioning creditor's debt but also the debts of the other creditors; and that being so, I am of opinion that it was a breach of faith to use the adjournment to defeat the petition on the next day by making a tender, not of all the debts, but only of the debt of the petitioning creditor. There is no equitable ground for interfering with the legal rights which

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the creditor had acquired by complying with the requisites of the statute.

BRAMWELL, J.A. :—

I am of the same opinion. The utmost we can say in favour of the Appellant is that it may be that the Registrar has power under certain circumstances to refuse the adjudication when a tender is made of the petitioning creditor's debt and costs. I do not say that it is so, but that is the utmost that can be said; the Registrar may perhaps have a discretion. But in the present case I am of opinion that the Registrar was not bound to exercise his discretion to refuse to make an adjudication, if he had such a discretion.

Amphlett, J.A.

AMPHLETT, J.A. :—

I am also of the same opinion. I wish only to add that our decision must not be taken to mean that the order for adjudication is to follow as a matter of course when the statutory requisites are proved to exist. The Lord Justice has suggested a case, and others may be conceived, in which the Registrar or the Judge might, I think, exercise a discretion to refuse to make the order.

Solicitors: *A. Leslie; G. L. Norman.*

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V.-C. M. *Feb.* 1, 2, 4, 5, 8, 9, 14, 15, 16.

C. A. *May* 23, 24, 25; *Dec.* 14.

MORGAN *v.* ELFORD.

[1874 M. 17.]

Principal and Agent—Collusion by Agent and Purchaser—Joint Liability—Appeal—Staying Proceedings.

Held, by *Malins*, V.C., that where an agent for the sale of an estate colludes with a purchaser and in consideration of a bribe or *honorarium* allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale.

On appeal, the Court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should

have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points.

A party to whom costs have been ordered to be paid will not be restrained from enforcing the order pending an appeal to the House of Lords, if his solicitors undertake to refund if the order should be reversed.

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Statement.

IN the year 1872 the Plaintiff was owner of a leasehold colliery in *Glamorganshire* which he wished to sell. The Defendant *Elford* was a merchant and commission agent at *Swansea*, and was in the habit of occasionally selling collieries and other property. A correspondence, commencing in the latter part of 1872, took place between the Plaintiff and *Elford* as to the latter finding a purchaser for the colliery, and was continued till May, 1873, when *Elford* having mentioned a Mr. *Palmer* as likely to purchase, the Plaintiff, on the 3rd of May, 1873, wrote to *Elford* as follows:—

"Dear Sir,—I am now at liberty and disposed to sell to your friend Mr. *Palmer*, at £25,000 cash. You may have a month from this day to negotiate with him. What you get over £25,000 you may have by way of commission. You will please understand that this offer is confined to Mr. *Palmer*. In other words, I could not allow my property to be 'hawked about.' Of course I reserve to myself the right of selling without being liable for any commission or expense provided you do not effect a sale with Mr. *Palmer* during the month."

On the 5th of May, 1873, *Elford* replied:—

"Dear Sir,—I have your letter of 3rd inst., and notice you place your colliery under offer to me at £25,000 cash, subject to reply in a month, but I cannot agree to your stipulation that it must be sold to Mr. *Palmer*, as the gentleman whom I drove over to inspect the colliery is in no way connected with Mr. *Palmer*; at the same time, if I fail with him, I may succeed with *Palmer*, and it can make no difference to you to whom I sell it so long as you get your money. I observe you say my commission must be in excess of the £25,000 named, which I regret, as it may make it difficult, if not impossible, to carry the business through. If you will say £25,000, I would be willing to make my consideration £3000, which would leave you £22,000 net for the colliery.

"Please say if you agree to this in due course. I am anxious

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to bring about business if possible, and am willing to make a considerable modification of my terms to accomplish it; and I think it would be to your interest to act in a similar spirit.

"P.S. You should give a reasonable time for payment if you have the colliery as security, as you would have."

On the 6th of May the Plaintiff wrote the following answer to this letter:—

"I am now at liberty and disposed to sell to your friend at £25,000 cash. You may have a month or six weeks to negotiate with him.

"What you get above £25,000 you may have by way of commission. Of course I reserve to myself the right of selling, without being liable for any commission or expense, provided you do not effect a sale with your friend during a month or six weeks."

On the same 6th of May *Elford* wrote to the Defendant *Crispe* as follows:—

"Dear Sir,—As agent to Mr. *Charles Morgan*, of *Llanelly*, I hereby place under offer to you the *Gwaun-cae-Gurwen* colliery, with everything in, upon, and belonging thereto, live and dead stock, for the sum of £30,000, which is to include the profit royalty of 3*d.* per ton on that part of the above property sublet to the *Amman Iron Company*. This offer is made subject to your reply on or before the 28th instant."

The Plaintiff's letter of the 6th of May was not satisfactory to *Elford*, who, at a personal interview with the Plaintiff, asked him to write two letters, one naming the lowest sum the Plaintiff would take for the colliery which might be shewn to a purchaser, and the other containing a promise by the Plaintiff to pay *Elford* a definite sum as commission on completion. The Plaintiff agreed to this, and on the 8th of May wrote to *Elford* the two following letters:—

"If through you I dispose of these collieries for £30,000 in a month or six weeks from this date, I am willing to allow you £5000 from that sum as commission."

"I am now at liberty and disposed to sell these collieries, with the

plant and wharf at *Llanelly*, for £30,000 cash. Of course I reserve to myself the right of selling, without being liable for any commission or expense, provided you do not effect a sale during a month or six weeks from the date of this. It is also understood that there is to be no advertised company."

On the 9th of May *Crispe* wrote to the Plaintiff:—"Mr. *Elford*, as your authorized agent, having given me the refusal of this property at £30,000 until the 28th instant, I am glad to inform you the matter is in train, and, if the representations made are substantiated, will no doubt be carried out."

On the 13th of May *Crispe* wrote to *Elford*:—"I have been at work every day, but find you have given me too little time, so I should be extremely obliged if you could extend the refusal one week. . . . I saw Mr. *Noble's* friend at my club, and confess I did not think much of him. Mr. *Noble* said to me to-day that you would expect a share in the profit. I told him he was wrong, as you had informed me to the contrary (I need not say how happy I should be to testify my approbation by an *honorarium*). I merely mention this in confidence, as Mr. *Noble* has a knack of providing for a share out of every one's profit, and might have arranged with you for a share of your commission from Mr. *Morgan*. This must not be, as Mr. *Noble* will be sufficiently remunerated by the handsome sum I shall allow him. Kindly urge Mr. *Morgan* on. Keep me apprised with what transpires. Also send me the week's grace, which will give me breathing time."

On the 14th of May *Elford* wrote to *Crispe*, extending the option to the 31st, and saying: "I hope your friends will not miss a good chance, and I feel they will never regret buying it. I know the property is a valuable one. I do not make it a *sine quâ non* that you pay me anything in the event of your buying this property, but shall be quite content to leave that matter in your hands." On the 22nd he wrote to the Plaintiff: "By a letter received to-day from Mr. *Crispe* I have reason to believe his client and a competent surveyor are on the way to inspect your colliery."

On the 28th of May *Elford* wrote to *Crispe*: "No one has yet turned up from you respecting Mr. *Morgan's* colliery, and I regret so much time has been wasted over this business. You have already had the colliery under offer to you for nearly three weeks,

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and nothing seems to have been done to inspect the property. Your time expires on the 31st instant, and under the circumstances I do not feel disposed to extend it, as I have other parties willing to purchase."

On the 29th of May *Crispe* wrote to *Elford* as follows:—"In answer to your letter of the 6th of May, in which, as agent of Mr. *Charles Morgan*, of *Llanelly*, you offer me the *Gwaun-cae-Gurwen* colliery, with everything in, upon, and belonging thereto, live and dead stock (together with the profit royalty of three pence per ton on that part of the above property sublet to the *Amman Iron Company*), at the sum of £30,000, providing I agree to buy the same on or before the 28th inst., and which time, under your letter of the 14th of May, you extend to the 31st inst. I hereby agree to purchase the said property under the terms of your letter of May 6th inst."

A copy of this letter was sent to the Plaintiff on the 30th of May by *Elford*, with the following letter from him:—"I duly received your letter of the 27th inst., and I have now the pleasure of informing you that I have a letter to-day from Mr. *Crispe*, agreeing to purchase the *Gwaun-cae-Gurwen* colliery, with machinery and plant of every description, including live and dead stock, for the sum of £30,000, and I shall be glad to hear from you per return of post, saying when it will be convenient for you to meet me in *London* to have an interview with Mr. *Crispe*, with a view to the completion of this purchase. Please say what cash deposit you require, and what time you will give for payment of balance, you holding the necessary security. You will not, of course, name to Mr. *Crispe*, or any other person, our private arrangement to allow me £5000 as commission for finding you a purchaser. I send a press copy of this to you at *Llanelly*, to be forwarded, and I also enclose a copy of Mr. *Crispe's* letter to me, accepting the offer of the colliery."

The Plaintiff upon this consulted with his solicitor, Mr. *Charles Norton*, who on the 3rd of June wrote the following letter to *Elford*:—"Dear Sir,—My client, Mr. *Morgan*, has sent me your letter to him of the 30th ult. He knows nothing of Mr. *Crispe*, and therefore, before he could think of entering into any contract he must be satisfied that the purchaser is in a position to carry

it out. Does Mr. *Crispe* desire to buy for himself, or for whom? and is he prepared to pay the usual deposit of £10 per cent., and to complete in a reasonable time, say at Michaelmas next?"

Elford forwarded this letter to *Crispe*, and a correspondence ensued between *Crispe* and *Norton*, in which the latter insisted that no binding contract had been entered into, but expressed the Plaintiff's readiness to complete if *Crispe* was prepared with the £30,000.

Pending these negotiations, *Elford* wrote on the 7th of July, to the Plaintiff:—"Dear Sir,—Having sold your *Gwaun-cae-Gurwen* colliery to Mr. *Thos. E. Crispe*, of 24, *Gloucester Place, Hyde Park, London*, I now beg to enclose herein a debit note for the amount due to me for commission, according to the written agreement between us, say £5000, and I shall feel obliged by your remitting me a part of this sum during this week."

On the 12th of July Mr. *Norton* answered:—

"Sir,—Mr. *Morgan* has sent me your letter to him of the 7th instant. He thinks you must have intended it as a joke; but, whether or no, he declines to entertain your claim for an instant.

"You are aware that he refused from the first to recognise your alleged sale to Mr. *Crispe*, and you must know, as well as Mr. *Morgan* does, that Mr. *Crispe* is no more able to carry out a contract for £30,000 than you are yourself.

"If you think you can make anything of your claim, the sooner you consult your solicitor, I think, the better."

A correspondence went on, into the particulars of which it is needless to enter, and on the 5th of September *Norton* wrote to *Crispe*, telling him that if he was prepared to pay the £30,000, it was immaterial whether there was a binding contract, but that if he was not, any further correspondence or any litigation would not benefit him or Mr. *Morgan*.

About the 10th of September Mr. *Donague*, who was the solicitor of *Elford*, called on *Norton* on behalf of *Crispe*, and stated that parties who were willing to pay £30,000 for the Plaintiff's colliery were then in *Swansea*, and were ready to enter into a contract immediately, and to pay a substantial deposit. The Plaintiff, being satisfied that the parties referred to were in a position

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to complete the purchase, directed his solicitor to prepare an agreement. This agreement was dated the 11th of September, and was made between the Plaintiff, of the one part, and *T. E. Crispe*, *W. J. Goulton*, *T. Cooper*, *J. Harris*, and *A. G. Harris*, thereinafter called "the purchasers," of the other part, and was an agreement by the Plaintiff to sell to the purchasers for £30,000, and £3000 deposit was paid down by the purchasers. *Goulton*, *Cooper*, and *J.* and *A. G. Harris* were in fact sub-purchasers from *Crispe* at an advance of £10,000.

On the 28th of October the purchase was completed, and £5000 of the £30,000 purchase-money was handed over by the Plaintiff to *Elford*. The conveyance was made between the Plaintiff of the first part, *Crispe* of the second part, and *Goulton*, *Cooper*, *J. Harris* and *A. G. Harris*, of the third part, and by it, after reciting the agreement by the Plaintiff to sell to the five for £30,000, and that *Crispe* had agreed to release to the other four his interest in the agreement, the Plaintiff, in consideration of £30,000 paid to him by the parties of the third part, assigned by *Crispe's* direction, and *Crispe* released to the parties of the third part the property which was the subject of the sale. This conveyance was only stamped with an *ad valorem* stamp for £30,000, but this was afterwards rectified.

On the 30th of October, 1873, *Elford* sent a letter to *Crispe* which was in part as follows:—"You have, no doubt, ere this heard that your nice little cheque for £10,000 has been duly paid, and I shall now be glad if you kindly make me a remittance of your promised handsome *douceur*."

Shortly after the completion of the purchase the Plaintiff discovered that the real price which the four purchasers had paid for the colliery was £40,000, and that £10,000, part thereof, was paid to *Crispe*. *Norton* thereupon wrote to *Cooper*, one of the purchasers, for information as to the payment of the £10,000 to *Crispe*, instead of its being paid to the Plaintiff; and to that letter *Cooper* replied, on the 5th of November:—"With regard to the purchase of the colliery, we are equally sorry with you that Mr. *Morgan* should not have had a greater portion of the £40,000." *Norton* then wrote to *Crispe*, demanding repayment to the Plaintiff of the £10,000.

Crispe refusing to repay the money, the Plaintiff filed his bill against *Elford* and *Crispe*, alleging that *Elford* had formed a scheme for inducing the Plaintiff to sell the colliery below its value, in order that *Elford* might make a profit by re-selling it at a higher price. That the Plaintiff had never dealt with *Crispe* as being the purchaser, but looked upon him as a person who was assisting *Elford* in finding a purchaser. That the fact of £40,000 being given for the colliery had been concealed from the Plaintiff, and that he would never have entered into the agreement of the 8th of October, 1873, if he had known that fact. The Plaintiff claimed to be entitled to the £10,000, and charged that the Defendant *Elford* had received, or would receive, some part of it; that *Elford*, being the Plaintiff's agent for the sale of the colliery, could not lawfully receive any sum in respect of the sale other than the commission allowed him by the Plaintiff, and that all sums received by him in respect of the £10,000 were so received in trust for the Plaintiff, and ought to be accounted for, with interest.

The bill also charged that *Elford* was bound, as the Plaintiff's agent, to obtain for him the best possible price for the colliery, and to give to the Plaintiff full information as to the value of the colliery and all offers made for the purchase thereof; and that *Elford*, having, in breach of his duty as the Plaintiff's agent, wilfully and fraudulently neglected to obtain such price, and to give to the Plaintiff such information, was liable to make good to the Plaintiff all sums which might or would have been received by the Plaintiff in respect of the purchase-money, but for such breach of duty and fraudulent neglect.

The bill further charged that *Crispe*, having full knowledge of *Elford's* agency, and having colluded with him in a fraudulent breach of his duty as such agent, was liable to account for and make good to the Plaintiff the £10,000, or at any rate so much thereof as was received by him for his own use and benefit.

The bill prayed that the Defendants might be declared jointly and severally liable to pay, and might be ordered to pay, to the Plaintiff the £10,000, with interest, at such rate as to the Court should seem just; or, failing this, then that *Elford* might be declared a trustee for the Plaintiff of all sums received by him out of or in respect of the said sum of £10,000, and might be

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ordered to pay such sums, with interest, to the Plaintiff; and might be declared liable to make good, and might be ordered to pay to the Plaintiff, with interest, all sums which might or would have been received by the Plaintiff in respect of the purchase-money of the colliery, but for *Elford's* breach and fraudulent neglect of duty. And that *Crispe* might be declared liable to account for and make good, and might be ordered to pay to the Plaintiff, the £10,000, or so much thereof as was received by him for his own use and benefit, with interest thereon.

Elford, by his answer, alleged that the Plaintiff authorized him to sell the colliery for the sum of £25,000, and that he was to be entitled to anything he should get over that sum. He denied that he had made any gain or profit beyond the £5000, or that he formed or entertained any design to defraud the Plaintiff or to keep him in ignorance of the price really paid for the colliery. He alleged that the Plaintiff perfectly well knew that he was dealing with *Crispe* as a principal, and not as a person assisting him to procure a purchaser, and he submitted that his letter to *Crispe* of the 6th of May, and *Crispe's* answer of the 29th, made a binding contract, and that it was no concern of the Plaintiff that *Crispe* re-sold for £10,000 more. He said that he had informed the Plaintiff of all matters which it was his duty as an agent to tell him up to the time of the contract with *Crispe*, but when that was effected he considered that his duty ceased, and he had then left the matter entirely in the hands of *Crispe*. He denied that there was any collusion or connivance between him and *Crispe*.

Crispe, by his answer, asserted that he had contracted to buy this colliery on his own account, intending either to get others to join him in the purchase, or to work the coal on his own account; that the contract he had entered into with *Elford* was a valid contract with the Plaintiff through his agent, and having so become the purchaser, he was entitled to re-sell the property at the best price he could obtain. He said that he was never introduced to the Plaintiff as a person who would assist *Elford* in procuring a purchaser; that he had never received any portion of the commission paid to *Elford*, and though he admitted writing a letter in which he had offered an *honorarium* to *Elford*, he denied having paid him anything. He said that the price he had paid

for the colliery was the full value of it at the time; but that coal having risen in price, all collieries had gone up in value, and he had been able to obtain purchasers at a higher price. He denied that there was any collusion whatever between him and *Elford*, and he had only proposed an *honorarium* in consideration of his obliging him by allowing him a few days longer to carry out the contract. Statement.

The Plaintiff and the Defendants, the four sub-purchasers, and *Norton*, *Donague* and *Palmer*, were all cross-examined in Court upon their affidavits. It is unnecessary to enter into the particulars of the evidence, the view of which taken by the Judges will be gathered from the judgments.

The cause came on for hearing before Vice-Chancellor *Malins* on the 1st of February, 1876, and was continued on the 2nd, 4th, 5th, 8th, 9th, 14th, 15th, and 16th of February.

Sir *H. Giffard*, S.G., *Glasse*, Q.C., and *Romer*, for the Plaintiff:— Argument.

Elford, being the Plaintiff's agent for sale, was bound to obtain for him the best price he could, to act honestly and faithfully with respect to the sale, and to give the Plaintiff information as to the offers made. *Elford* knew of the offer of £40,000 made by *Goulton* and the co-purchasers, and it was his duty to give information of this offer to his employer. No binding contract ever was entered into to sell to *Crispe*. It was a fraudulent collusion between *Elford* and *Crispe* to obtain a higher price at the expense of the Plaintiff, and that this was so is clearly shewn by the offer of a handsome *honorarium* by *Crispe* to *Elford*, and *Elford's* acceptance of it. Then with regard to *Crispe*, the precise point arising in this case arose in the case of *East India Company* v. *Henchman* (1). *Crispe* entered into a fraudulent bargain with *Elford* to obtain a power only given by betraying his master. The two Defendants, therefore, are bound to refund the £10,000 which, by their fraudulent collusion, was obtained for the colliery.

Higgins, Q.C., and *Everitt*, for *Elford*:—

The charges made against the Defendants are disproved by the evidence. The price the Plaintiff set upon the colliery was £25,000

(1) 1 Ves. 287, 289.

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cash, and the authority he gave to *Elford* was to sell at that price, and to keep whatever he could get over that sum for his services. The Plaintiff and *Elford* were not strangers to each other, but, until these transactions commenced, *Crispe* was a total stranger to *Elford*. After the contract was entered into between *Elford* and *Crispe* the matter was entirely taken out of the hands of *Elford*. The terms upon which *Elford* was engaged to sell were well considered on both sides, and he had authority to do what he has done, that is, to sell to *Crispe* for £30,000. The transaction between him and *Crispe* was honest and *bonâ fide*. The whole case made by the bill is one of distinct fraud and cheating, and no such case is proved. Then it is alleged that it was the duty of *Elford* to tell the Plaintiff that the colliery had been re-sold for £40,000. Now, the fact is that he did not know what sum *Crispe* was to get, and it certainly was not the duty of *Crispe* to inform him. If *Crispe* was the *bonâ fide* purchaser, what had he to do with telling the vendor or his agent what he was going to re-sell the property for; he was justified in making what profit he could.

There is no authority to support the contention that *Elford* can be made to pay £10,000. It is not asked to set aside the contract. They wish to sustain the contract, but to make *Elford* pay £10,000, which he had nothing whatever to do with, and which he never received a shilling of.

Then we say that the whole case is disposed of by the evidence, which proves that the Plaintiff and his solicitor had information before the contract was signed that *Crispe* had sold the property for £40,000.

Cookson, Q.C., and *Kisch*, for the Defendant *Crispe*:—

It is not alleged that *Crispe* ever occupied a fiduciary character towards the Plaintiff, and there is no equity to make him responsible for the £10,000. The whole case made against him is one of fraud and collusion, which is totally disproved. If *Crispe* is not an agent, the only way in which he can be charged is that he has colluded with the agent to cheat the Plaintiff. If he was a purchaser from the Plaintiff there can be no equity against him for concealing the sub-purchase from the vendor. There is nothing illegal or immoral in a person purchasing for £30,000 and

selling for £40,000. Suppose there was a doubt whether *Crispe* had a binding contract, which is a very natural thing when the contract is formed by letters, then believing he had a good claim to have a sale to himself for £30,000, what was there to prevent his selling that claim for £10,000? In doing that he was not bound to disclose what he got to the vendor.

Then take the view that there was no contract at all, but that he found and introduced persons to the Plaintiff as purchasers, there was nothing illegitimate in that. Suppose the £10,000 was a procuration fee, there could be no privity between him and the Plaintiff in respect of the procuration money. It may, therefore, be put in three ways: first, that he was a purchaser; secondly, that he believed he was a purchaser; and, thirdly, that he was only a stranger finding a purchaser. In none of these capacities could there be any equity against him.

The whole case as to fraud and collusion lies in the letters about the *honorarium*, and that was a matter of the smallest possible importance, and is simply explained by the fact that the *honorarium* was proposed for obtaining an extension of a few days' time for *Crispe* to complete the arrangements.

Glasse, in reply.

MALINS, V.C.:—

This is a suit of a very extraordinary and unusual character. It has occupied, considering the stake involved and the extent of the evidence, more time than any case within my experience. I am bound to say that the great consumption of time has arisen from a want on the part of the Defendants engaged in these transactions of candour and straightforward dealing, which candour if it had been exercised, and straightforward dealing if it had taken place, would have prevented the possibility of the painful dispute which has arisen. It is also a most painful case for a single Judge to decide, since there is great conflict of evidence, and I am obliged to draw the best conclusion I can to ascertain on which side the truth lies, the evidence being so positively conflicting that it is impossible to reconcile the statements made on the part of the Plaintiff and those made on behalf of the Defen-

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dants, or even those made by the professional men engaged on either side. I should have been very glad if I could have had the assistance of a jury, but, as it is, my duty will be to arrive at the best conclusion I can.

The Plaintiff, Mr. *Charles Morgan*, has been for many years engaged in collieries, and was the proprietor at the time of these transactions of a colliery in *Glamorganshire*. The Defendant, *Elford*, is a merchant and shipowner, and in a large way of business, he is not an estate agent, but has occasionally been in the habit of selling collieries and other property. The Defendant, *Thomas Edward Crispe*, during the year 1873 was studying for the Bar, and was called to the Bar by the *Middle Temple* in January, 1874. He is now forty years of age, and his previous occupation had been that of a land surveyor and estate agent, and he had also acted as an auctioneer. His means seem to have been very small, but, in connection with a Mr. *Noble* and other people, he had been in the habit of speculating in property which he was not able to pay for, and in this manner he became aware of the fact that Mr. *Morgan's* colliery was to be disposed of.

From the evidence, I come to the conclusion that *Elford* rather importuned *Morgan* to sell his colliery than that *Morgan* applied to *Elford* to do so, and the arrangement between them is of a very unusual character, namely, that if *Elford* could sell the colliery for a particular price, all he could get above that price he might have for himself, and upon that ground it has been argued that *Elford* was not the agent of *Morgan*, but I take it to be perfectly clear from the beginning to the end of these transactions that *Elford* was the agent of *Morgan*, and that he owed to *Morgan* all the duties which an agent owes to his principal, amongst which duties are these, that he is to be true and faithful to him, that he must do his best for him, and if he is employed to sell the property it is his duty to get the best price for it that he can. It appears that *Morgan* and *Elford* had been in communication respecting the sale of this colliery from the latter part of the year 1872 down to March, 1873, and that up to the 20th of March, 1873, *Elford* had never heard of *Crispe*, and I believe *Crispe* had never heard of *Elford*. At this period, *Crispe*, although studying for the Bar, held a situation in an upholsterer's

business in *London*, and he was in the habit of buying estates on speculation in the hope of selling them at a higher price, and having been introduced to *Elford* while at *Swansea*, they both drove over from *Swansea* to the Plaintiff's colliery on the 22nd of March, and there they met *Morgan*. I cannot make out that on that day it was at all intimated to the Plaintiff that *Crispe* was likely to buy the colliery. He was merely introduced by *Elford* as his friend, and *Morgan* says he understood *Crispe* was a person who would help *Elford* to sell the property, and he assumed that he would participate in any commission which was paid upon the sale. *Crispe* went down into the colliery to examine it, after which he returned to *London*. The negotiations continued between *Morgan* and *Elford*, and, ultimately, on the 3rd of May, *Morgan* wrote to *Elford* to this effect:—[His Lordship read this letter, which is already set out, and also the letter written by *Elford* on the 5th of May.]

The only authority in writing that *Elford* had to sell at that time was to sell to *Palmer* for £25,000, but upon the 8th of May, which is a very material date, *Morgan* writes to *Elford* in this way: "If through you I dispose of these collieries for £30,000 in a month or six weeks from this date, I am willing to allow you £5000 from that sum as commission." That was on the 8th of May, but, very curiously, on the 6th, two days before that letter, *Elford* had committed the fatal step which has given rise to all this litigation—a step which I am bound to say after all that I have heard, whether it was the object he had to carry into effect or the manner in which he proceeded to carry it into effect, was as gross an error and miscarriage on the part of an agent as I have ever known. Now, he had no positive authority on the 6th of May to sell to anybody but *Palmer* for £25,000. His duty as an agent to sell was to get *Morgan* the best price, and, above all, to take care that he had a purchaser who would be able to pay. What, then, does he do? He first writes a letter to *Crispe*, dated the 6th of May, which is in these terms:—"Dear Sir,—As agent to Mr. *Charles Morgan*, of *Llanelly*, I hereby place under offer to you the *Gwaun-cae-Gurwen Colliery*, with everything in, upon, and belonging thereto, live and dead stock, for the sum of £30,000, which is to include the profit royalty of 3*d.* per ton on that part

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of the above property sublet to the *Amman Iron Company*. This offer is made subject to your reply on or before the 28th inst."

There is no provision when the money is to be paid, nor any security, nor any provision whatever for the protection of *Morgan*. He gives to the 28th instant to consider. What did he know of the man to whom he made that offer? I turn to his own statement, and find he says that he knew nothing of him except that *Crispe* told him he was studying for the Bar. Now, *Elford*, as a man of the world, would know that it is not usual for a man of forty to be a law student, and I think it is not requiring too much of such a man as *Elford* to suppose that *Crispe* must have had some occupation in life before, and he would naturally make some observation upon the subject; but what he does say in his evidence is, that he did not consider it his duty to inquire at all about the means of a purchaser; that the information he got from *Noble* was satisfactory to him, and if he could pay the instalment, that was all that could be required. Now, what can be said of the prudence of an agent for the sale of a colliery for £30,000 who will sell it to a man of whom he knows nothing, make no provision as to the time of payment, but commit his client to this, that if *Crispe* can pay, well; but if not, he has tied him up to a contract which *Crispe* is unable to perform, and thus put his employer in very great difficulty. But, however, the question is, whether this was done in good faith, or whether it was done upon some plan of arrangement between the parties? Now, he gave *Crispe* till the 28th to accept the offer, which was subsequently extended to the 31st, and on the 29th there is this letter from *Crispe*, which is relied upon as constituting a contract between them:— [His Lordship read the letter.]

Upon the face of it, therefore, this is the plan relied upon throughout. Here is an absolute offer by *Elford*, as the agent of *Morgan*, on the 6th of May, unconditionally accepted on the 29th of May, and I relieved counsel of any argument upon this subject, because I said, and I repeat now, that if honestly, fairly, and properly *Crispe* had become the owner of this property by purchase from *Morgan* for £30,000, he was at liberty to re-sell it for any amount whatever that he could get for it. But the question is, was there a contract, and was it a contract entered into under

such circumstances that these parties can get any benefit from it? In order to test this, it is necessary to look at what took place between the 6th and the 29th of May. During that period there are some remarkable letters, which, to my mind, go to shew the utter want of good faith, and the impropriety of dealing, both on the part of *Elford* and *Crispe*. *Crispe*, it is plain, was well aware that he was not in a position to buy this colliery, and I most unhesitatingly come to the conclusion that if *Crispe* had not found some purchasers for this colliery it would have been entirely beyond his power to have paid the £30,000, and he was, therefore, I think, recklessly and unfairly speculating at the expense of other persons; he endeavoured to tie up *Morgan's* colliery on the chance of his finding a sub-purchaser at a larger price; if he did so, well; and if not, then he and *Elford* had so managed that *Morgan* was to be put to the inconvenience of having this contract set aside, the completion of which there was no means of providing for.

[His Lordship then read the letter written by *Crispe* to *Elford* on the 13th of May.]

Now, that is a letter from a purchaser, or supposed purchaser, writing to the agent offering to bribe him. What would a man actuated by proper feelings have done upon receiving such a letter? Why did he not say, "You have insulted me by that letter. I return it, and have nothing more to do with you." Instead of that, he writes back to *Crispe* extending the time for completion of the purchase till the 31st, and he says, "I know the property is a valuable one. I don't make it a *sine quâ non* that you pay me anything in the event of your buying it, but shall be quite content to leave the matter in your hands." This is an agent of the vendor bargaining for a bribe from the purchaser. Is that a thing to be tolerated, or which can receive any sanction from this Court? In his further correspondence, indeed from the very first day he undertook this duty of agent, or, at all events, from the day he became acquainted with *Crispe*, I find that *Elford* totally overlooked the interests of his employer, and was every day playing into the hands of *Crispe*, the object, no doubt, being to get his commission of £5000, and, provided he got that, the interests of *Morgan* were utterly disregarded. Then *Crispe* writes again on the 23rd of May asking for a further week's extension of

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time to complete, and adds, "you shall be no loser by the concession;" that, of course, means, If you give me another week I will remunerate you for it.

An observation has been made that the original time given was till the 28th, and the answer did not come from *Crispe* till the 29th, and this being a day too late it was fatal to the validity of the title. It is true there was an extension of time, and within that time the offer was accepted; but that extension of time was based in fraud, because it is fraud for the agent of a vendor to receive a bribe from the purchaser, therefore the contract never could have been enforced, and consequently there never was any contract between *Morgan* and *Crispe*. It is perfectly clear, beyond all possibility of doubt, that if the original offer was a good one up to the 28th, still, as the time was extended through the fraudulent consideration offered by the one and accepted by the other, it was therefore utterly void, and a thing under which *Crispe* could obtain no right. But, however, on the 29th the offer is accepted, and on the 30th it is communicated to *Morgan* by *Elford*.

[This letter will be found in the statement of the case.]

It has been argued that the two letters of May the 6th and 29th made a final binding contract, but here is *Elford* writing on the 30th that which he ought to have embodied in his proposal to Mr. *Crispe;* he should have said, "This is based on the stipulation that you will pay the deposit of 10 per cent. or something which will assure me that the contract will be performed;" but when he sees it was pending, and knew of its completion, he asks the Plaintiff, "What cash deposit will you require?" Why did he not ask that before the 6th of May? This is asking it too late, but at all events, here is his letter, treating the contract as not binding unless the deposit was paid.

It now became apparent both to *Crispe* and *Elford* that the colliery was worth much more than £30,000. That is placed beyond doubt by two or three letters. *Elford* knew that he had given *Crispe* a good bargain, that he had sold him a colliery for £30,000 which he believed to be worth some £50,000 or £60,000. Under these circumstances, inasmuch as Mr. *Crispe* had not responded to the demand of paying the deposit, what would have been *Elford's* course? If he had been a faithful agent he would

have settled with his employer and endeavoured to get rid of a purchaser who could not perform the very first thing to be done by a purchaser, namely, pay a deposit or give some security that the purchase should be completed.

Morgan then finds it necessary to consult his legal adviser, *Norton*, and *Norton* writes a very proper letter to *Elford*, making no complaint about the price, but saying he must be satisfied that *Crispe* is in a position to carry out the contract, and asking whether *Crispe* proposes to buy for himself or for whom, and whether he is prepared to pay the usual deposit of £10 per cent., and to complete in a reasonable time. Upon this *Elford*, on the 4th of June, informs *Crispe* of the letter he has received, and tells him that unless he can pay a cash deposit of at least £3000, they will not regard his letter as a contract, and that *Norton* would not advise *Morgan* to allow him further time to hawk the property about in order to sell it at an advanced price. He writes again on the following day, saying he had heard that *Norton* had been trying to sell the mine, and that he would probably put every obstacle in the way of *Crispe*, so that he might find a purchaser himself in order to secure a commission; and he continues: "Therefore I hope you will satisfy Mr. *Norton* that you mean business by depositing at once £3000 of the purchase-money. If you are not disposed to do this, please say so at once, as I believe I have a willing purchaser thereat, and rather than let the property slip through my hands, I should be inclined to take the whole responsibility on my own shoulders, and take my chance of getting up a company to work it, such is my faith in the value of the property." This letter contains a most unwarrantable suggestion as to *Norton* wishing to get a commission, when I find that *Norton*, from first to last, only urged this: "Let a deposit be paid, or some assurance given that the purchase-money will be forthcoming and we are ready to complete." The letter, at all events, is an admission on the part of *Elford* that there was no binding contract at that time. Two more letters to the same effect, still urging *Crispe* to act decisively, were written by *Elford* on the 11th and 13th of June. Then, on the 26th of June, there is a letter from *Norton* to *Crispe*, saying: "It is not a question of contract or no contract, but it is simply a question of

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ability on your part to pay Mr. *Morgan* the £30,000. Are you prepared to do so, and if so, when? Your solicitor will tell you that if there is any contract, which I do not admit, you are bound to find the money at once." Up to that time it is perfectly clear, upon the evidence, that *Crispe* was not in a position to pay the deposit, and there was not the least hope of his doing so until he got, as he subsequently did get, sub-purchasers for this property.

I repeat that it was *Elford's* duty to the Plaintiff, as an agent to his principal, to get as much for his colliery as he could, because I cannot accede to the suggestion that, when *Morgan* said, "If you get £30,000, you may keep £5000 for yourself," that if he had got £50,000, he would have been entitled to retain £25,000, that would have been to the last degree unreasonable, and could not have been enforced. It was his duty to get the best price he could beyond the £30,000, and if the purchase-money had been £50,000, to rely on *Morgan's* generosity to extend the commission if he thought fit; but, instead of standing by his employer, and doing his duty faithfully as an agent, he sides entirely with *Crispe*, and every one of his letters may be styled the playing into the hands of *Crispe* against the Plaintiff.

The delay in payment of a deposit still went on, and we find *Elford* writing to *Crispe* on the 31st of July, telling him he had heard of a colliery of less value than the one in question being sold for £80,000, and that *Crispe* might bring out a company and sell this colliery for £100,000. So matters continued till the 5th of September, when again *Norton* writes to *Crispe*, saying there need be no question as to a contract if the £3000 were paid, and the purchase could then be completed by the end of that month at the furthest; but if he was not prepared to pay the deposit, further correspondence or any litigation would neither benefit him nor *Morgan*. This, like the former letter from *Norton*, was, in my opinion, a most proper letter, but it was not answered.

It turned out after this that, through the instrumentality of *Noble*, a sub-purchaser was found, that is to say, *Goulton* and three others, who had agreed to give £40,000 for the colliery. Now, as I said before, if *Crispe* had honestly and fairly bought the colliery for £30,000, he was perfectly at liberty to re-sell it for £40,000, and put the difference in his pocket; but if there was

nothing to conceal, why was there concealment? I find, however, from the beginning to the end of this transaction, that there is nothing but concealment from *Morgan* and his adviser. When *Elford* heard of this, knowing quite well that there was no contract, for all his letters prove that he believed there was none, it was his duty to have told *Morgan* that the colliery was being sold for £40,000, and that he certainly ought to have a part of it. However, no such course was taken.

Then we come to the transactions regarding the sub-purchasers. The four gentlemen go down to *Swansea*, and, never having seen any of the parties before, they are introduced by *Elford* to his solicitor, Mr. *Donague*. Now I am desired to believe that, on the 10th or 11th of September, when *Donague* was first engaged in the business, he did not know what price these gentlemen were to give for the colliery. It appears that *Norton* was told it was £30,000, and accordingly here is a contract prepared by *Norton*, and executed by all the parties, including *Crispe*, by which *Morgan* is made to sell the colliery to these gentlemen, not for £40,000, but for £30,000. Now, I say, why was £30,000 put in the contract as the purchase-money? Would not open and fair dealing have required that *Donague*, if he knew it, should have said to *Norton*, "I introduce these gentlemen at the request of Mr. *Elford*, they have given £40,000 for the colliery, and you are to receive £30,000, because that is the price at which you have sold it to *Crispe*." What would have been the reply? Why, obviously, if *Norton* at that time had been told that these four gentlemen were to pay £40,000 for the colliery, would he not have said, "What! my client's colliery sold for £40,000; why is he not to have the £40,000? Oh, because you have sold it to Mr. *Crispe* for £30,000." What would have been the answer? "I have not sold it to Mr. *Crispe*, Mr. *Crispe* knows that. I have denied there is any contract, and Mr. *Elford* has denied that there is any contract. I made it a condition that a deposit should be paid; no deposit has been paid; there is no contract, and therefore I repudiate the notion that Mr. *Morgan* is to convey his colliery for £30,000 when £40,000 is to be paid for it." Now did *Donague* know that fact or not? The probabilities of the case, looking at the way business is usually conducted, are that he

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did. Is it according to the experience of any man that a solicitor, who is an experienced man, should be applied to by strangers to carry into effect the purchase of a colliery without being told the price of it? It is impossible, and I cannot believe it. However, there is his denial; but against that there is his own telegram to *Crispe*, dated the 13th of September, saying, "I will come up to *London* to meet you and your solicitor next Wednesday. I am quite aware of your terms with *Goulton*." He is also contradicted by *Crispe* himself, who said in his cross-examination he had no doubt he told *Donague* the price when he was at *Swansea*, that was on the 13th or 15th; and, again, there is the letter of *Crispe* to *Davis*, his solicitor, on the 16th, in which he says, "*Donague* also obtained from *Goulton* a letter that I was to be paid £10,000 additional. All this was done before I ever knew that such a person as *Donague* existed." This amounts to demonstration, in my mind, that *Donague* did, before the 16th, and indeed on the 11th of September, know the price to be paid by these purchasers was £40,000, and not £30,000; and I am also satisfied, upon the evidence, that he took great pains to conceal that fact from *Morgan* and his adviser. Then it appears that, in consequence of a delay on the part of *Morgan*, the contract was not actually signed till the 8th of October, and it was carried into effect on the 28th of October, up to which time it does not appear that there was the slightest intimation to *Morgan* or *Norton* that the price was more than £30,000. Now, whatever *Donague* knew in September, it is unquestionable that in October he did know that the purchase-money was £40,000, because he admits that he was aware of it on the 17th of September. The draft conveyance was prepared by *Donague*, and approved by *Norton;* and still adhering to the rule that, if there is nothing to conceal, there ought to be no concealment, and that in all these matters of business there should be openness and straightforward dealing, I ask, if *Donague* knew that £40,000 was the price to be paid, as unquestionably he did, why was not the deed framed in such a way as to carry out the contract, as, for instance, in this manner:—"Now this indenture witnesseth that, in consideration of £30,000 paid to *Morgan* by the direction of *Crispe*, and in consideration of £10,000 paid to *Crispe*, *Morgan*, by the direction of *Crispe* (who had become owner of the estate by

a contract, as they alleged), would convey, and *Crispe* would ratify and confirm, the colliery to these purchasers"? Then this ought to have been stamped properly, as a deed executed for the consideration of £40,000. That, however, was not the course adopted; but, as the contract prepared on the 11th of September was a contract for £30,000, so this conveyance is a conveyance for £30,000 also. After all the arguments of counsel, I have utterly failed to discover any honest motive in drawing that deed, not in accordance with the real facts, but diametrically opposed to them. I can find no excuse for it whatever, and the only theory I can come to is that it was felt that there was something to conceal which would effectually be concealed by presenting to *Morgan* and to *Norton* a conveyance to sell the colliery for £30,000 instead of £40,000. The representation put forward is that they made a mistake in drawing this deed for £30,000, and that it was consequently erroneously stamped, and they were obliged to present a memorial in the following month to the stamp office to allow the deed to be stamped as a £40,000 purchase instead of £30,000. Did *Donague* think that a deed for £40,000 could be stamped for £30,000? If so, that was ignorance. But is there an object the other way? I think there is. To prevent *Morgan* and *Norton* from knowing of the £10,000. It is plain enough. I am sorry to be obliged to come to the conclusion that that was the object; and I am sorry, therefore, that it is a conclusion which may very seriously involve the professional character of *Donague*. I am at all times anxious to throw every protection round the character of professional men, but I can find no excuse for this. Either they believed there was a contract, or they did not. If they believed that *Crispe* had become the owner of this colliery for £30,000, why not have disclosed their view to *Morgan* and his adviser, and have told them in writing, so that there could have been none of this cross-swearing? A line would have been sufficient: "You are to convey to *Crispe* for £30,000, and he is to have £10,000 more, making the purchase-money £40,000." Then, when the conveyance was ready for execution, that which is very unusual in such transactions takes place. The day fixed for the completion of the purchase was the 28th of October, and these four purchasers, accompanied by two friends, travel from *Rotherham* to *Swansea* in

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a saloon carriage together, but it is strange that they can recollect nothing of what took place on their journey; none of them can remember what took place at *Swansea*, and this was only a year ago. *Crispe* and his solicitor, *Davis* (upon whose conduct I find no imputation whatever), went down to *Swansea* also, and were there on the 28th of October.

Now, what would have been the ordinary mode of conducting business if there had been nothing but what was honest and straightforward? And here I am bound to say that I think *Norton* is not free from blame for the manner in which it was conducted. Here were two parties interested in the colliery—*Morgan*, who had sold to *Crispe* for £30,000, and *Crispe*, who had re-sold to *Goulton* and others for £40,000. *Morgan* had to receive £30,000, and *Crispe* had to receive £10,000. If anything but fairness was intended, why were not *Crispe* and *Davis* invited to go to *Norton's* office to complete this purchase? But it is a remarkable thing that, during the whole of that day down to dinner-time, *Crispe* and *Davis* were playing hide-and-seek, stopping in *Donague's* office when they ought to have been at *Norton's*, and instead of going to execute the deed at *Norton's* office there were two visits, all the four purchasers going to *Norton's* office, and then going back with *Donague* to his office to get the execution by *Crispe*, when *Donague* might much better have taken *Crispe* to *Norton's* office. If that had been done, there would have been a complete disclosure, and every one would have known the truth of the transaction, that *Crispe* was to receive £10,000. However, the course pursued was as I have described, *Donague* went to *Norton's* office, leaving *Crispe* and *Davis* at his own office; and when the deed was executed by *Morgan* and the four purchasers, then *Donague* takes the purchasers down to his office, where the deed is executed by *Crispe*, and the purchasers actually pay £10,000 by a cheque to *Crispe*, and that fact, as far as I can see, was concealed from *Norton* and *Morgan*.

Then it appears that *Norton* became dissatisfied with the nature of the transaction, and I am bound to say that the only thing I see in favour of the Defendants is the want of caution on the part of *Norton*. I think, considering the nature of the correspondence that had taken place between *Norton* and *Crispe*, *Norton* might well have supposed *Crispe* was to get something by this purchase.

Why it was that *Norton* did not put the question, "What is *Crispe's* position; what is he going to have?" I do not know. If he had put that question to the purchasers, I see no reason to doubt that they would have answered him honestly, "We are going to pay *Crispe* £10,000;" or if he had asked *Donague* what *Crispe* was to have, I think *Donague* would have told him. However, that was not done. Perhaps it may be met by the observation that one man is entitled to believe another upon the representations made to him, and to act upon the truth of the representations, and that the effect of it was that the conduct of *Donague* and all these parties amounted to a representation that £30,000 only was to be paid for the colliery. At all events, it may be said on their behalf that they must have thought *Crispe* was going to get something by it, but then *Morgan* says he was under the impression that *Crispe* "was to go snacks with *Elford*." That was his own expression in cross-examination, that is to say, that *Crispe* was to share the £5000 with *Elford*, and this he might well have supposed, considering the handsome remuneration *Elford* was to have for the small amount of work done by him, extending to not more than a week. *Elford* might have considered himself sufficiently fortunate to pay something to the man who had been the means of his gaining the money. However, the transaction was completed, the £10,000 was paid to *Crispe*, and then comes the letter from *Elford* to *Crispe* on the 30th of October, two days after the contract was completed, which satisfies me that from beginning to end *Elford* entirely overlooked the interest of his employer, and was playing into the hands of *Crispe*. This was the letter: "You have, no doubt, ere this heard that your nice little cheque for £10,000 has been duly paid, and I shall now be glad if you will kindly make me a remittance of your promised handsome *douceur*, and at the same time I hope you will not object to inform me in confidence the exact sum you have to allow *Noble*, as I have some matters to arrange with him in regard to the sale of this colliery. You will remember my asking you this question when you were here a few weeks since, and you then said you could not name the exact sum, but that it would not be less than £1000. Congratulating you upon the termination and, to you, splendid result of this colliery transaction, I remain, &c."

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Here, again, is the agent of the vendor bargaining with the purchaser for the handsome *douceur*. One must have offered it, and the other accepted it; but he is not satisfied with this *douceur*, for he is also to take advantage of the fact that *Noble* would get something handsome, in order that he might get something from *Noble* which probably he might not otherwise get. Thus there were to be two profits made. I think *Elford* might well congratulate *Crispe*, considering the manner in which he had got the £10,000. It is plain they thought they had succeeded well. *Elford* had managed that it should not be communicated he had received his £5000, *Crispe* had got his £10,000, *Donague* had received from the purchaser a bill of costs of £460, which seems very large, but if the purchasers do not object to pay it, I can raise no objection; and he had got £150 from *Crispe*. Now, he had not been *Crispe's* solicitor for more than two or three days, and that without any authority; and the only excuse there is to be offered for the £150 paid by *Crispe* is that *Donague* had gone to *Rotherham* for him. It is true that a solicitor does not in general get such a large sum for a journey like that. However the money was paid to him; and then the extraordinary thing is that he also got £200 from *Elford*. A solicitor of position of course never condescends to pay parties for an introduction; and what had *Donague* done for *Elford*? *Elford* had done something for him by introducing these valuable clients from whom he had a bill of costs for £460; but I cannot understand what *Donague* had done for *Elford*. Why did *Elford* give *Donague* £200? *Donague*, when asked by me to explain this event, which appeared to me to be beyond all usage, and contrary to all experience, could give no sort of explanation. He said it was voluntary, and that was all. The theory of the Plaintiff is that the Defendants had been very successful; they had succeeded in drawing the contract for £30,000, and got the conveyance through as a conveyance for £30,000. Not a scrap of writing had been under the eyes of *Morgan* or *Norton* to shew that the real price paid was £40,000, so that £150 paid to *Donague* by *Crispe*, and £200 paid him by *Elford*, was as a mark of their appreciation of his skill in getting this thing through without discovery. If the payment was for ordinary professional services, then it was out of all experience. I confess I can find no rational

theory that gives any satisfaction to my mind except that it was a reward for successfully concealing the transaction, and enabling *Crispe* to get possession of the £10,000. For *Donague's* sake I hope I am wrong, but as I feel I am right I can only act on the supposition that I am so.

In order to prove that *Norton* and his client knew that £40,000 was paid for this colliery, there is a bit of evidence brought forward which I confess it is exceedingly difficult to deal with. The four purchasers and the two friends who accompanied them have made affidavits, and they all swear that on the 28th of October, 1873, the day on which the purchase was completed, they paid *Crispe* the sum of £10,000 agreed upon as the consideration for the purchase from him. This took place at *Donague's* office. They also went to *Norton's* office, and there, before the conveyance was executed, the subject of the purchase was discussed, and in the course of the conversation which took place, the commission payable to the Defendant *Elford* and the profit realized by *Crispe* on the subsale of the colliery, and the amounts thereof respectively, were mentioned by and made known to the Plaintiff and to *Norton* before the Plaintiff executed the deed, and they then heard and knew that *Crispe* was to be paid the £10,000 profit which he had made on the sale. *Morgan*, on the other hand, states very positively that he did not on the 28th of October, or at any time before, know or suspect, or had reason to believe it; and that on the 28th it was never mentioned in his presence, nor was he aware that any more than £30,000 was to be paid for this colliery. *Norton*, his solicitor, is equally explicit. He most solemnly swears that on the 28th of October he never heard a word about anything more than £30,000 being paid for the colliery; and *Norton's* clerk confirms that statement. *Goulton*, who was the principal person acting in the negotiation of the purchase on behalf of himself and the other purchasers, says, "I do not remember anything particular being said why *Crispe* did not go to *Norton's* office to get the £10,000. He left it to *Donague* to do what was proper. We should not have paid the £10,000 without *Norton's* authority. *Norton* said we were at liberty to go and pay *Crispe* the £10,000, or words to that effect. We had *Norton's* authority to pay £10,000 to *Crispe*. As soon as that was said we went to

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Donague's office and paid him by cheque £10,000." It is impossible, therefore, that there can be evidence more diametrically opposite than that of *Morgan* and *Norton* and *Goulton* upon this subject; but it is not only *Goulton*, but the other five witnesses all swear to the same thing. Now, considering the position of these gentlemen, it is impossible to attribute to them the intention to say otherwise than that which they believed to be true. The difficulty is, whether their evidence can be relied upon as to the time, but I confess it is more difficult to get over the express statement of *Goulton*, except on the ground of positive misstatement, and although there may be some discrepancy as to which meeting it was, yet they all positively swear that they had the direction of *Morgan* and *Norton* to pay this money to *Crispe*. All this is entirely at variance with the statement of *Norton*, which is so positive that if he is wrong I cannot do otherwise than come to the conclusion that he is deliberately committing perjury when he says that he did not know and had no reason to suspect, but firmly believed that the true transaction was represented by the contract and the deed. If *Norton* is right, then I can understand his subsequent letter; but if he is wrong, then I must say he is the boldest man I ever met with to state, as he does, in his affidavit, "Shortly after the completion of the said purchase, namely, on the 31st day of October, 1873, I for the first time discovered that the purchasers had really paid more than £30,000, and that the excess had been paid to the Defendant, *Thomas Edward Crispe*. I made the discovery in the following manner: The said Mr. *Donague* called upon me with reference to a matter not connected with this suit, and just before leaving me he remarked, alluding to the sale of the Plaintiff's colliery, that 'Now the business was completed he had no objection to tell me that his clients, Messrs. *Cooper* and others, paid the Defendant *Crispe* £10,000, the purchase-money being £40,000, and not £30,000.' The said Mr. *Donague* also said to me that the whole transaction appeared to be 'a swindle.' He did not, however, communicate to me the particulars of the Defendant *Crispe's* dealings with the purchasers. Immediately after his departure I informed Mr. *Pearce*, my managing clerk, what the said Mr. *Donague* had said to me, and determined at once to write to the purchasers, asking for further information on the subject."

Now, that is a positive statement of *Norton*, and he was not cross-examined upon it. But in all this extraordinary transaction it is much more important to see what the people did at the time, than to consider what they said a long time afterwards. I now come to the letter to which I before referred, which was written by *Norton* on the 1st of November, four days after the transaction, to *Cooper*, one of the four purchasers. He says: "Mr. *Donague* told me yesterday, to my great astonishment and disgust, that in addition to the £5000 given by my client by way of commission, Mr. *Crispe*, either alone or with Mr. *Elford*, received £10,000, the actual purchase-money being £40,000 instead of £30,000. I think you will see that Mr. *Morgan* has been very badly dealt with, and I should be much obliged if you will tell me the exact facts connected with your negotiations with Mr. *Crispe*. If you have not actually paid the £10,000, I must ask you to retain it until I am in a position to advise my client what course to adopt."

Now, it is not too much to assume that *Norton* must have been perfectly certain that that letter would be shewn to all the other purchasers and to the two gentlemen their friends, making five in all, in whose presence, it is said, this money had been recognised as having been properly paid to *Crispe*. If this account of *Norton's* was untrue, you would have expected *Cooper* to answer at once, "I am utterly astonished that you should have written such a letter as you have, telling me that you are astonished and disgusted to hear that £10,000 was to be paid to *Crispe*, when in my presence, and in the presence of five other gentlemen, you heard the facts stated four days before." But what does *Cooper* write: "With regard to the purchase of the colliery, we are equally sorry with you that Mr. *Morgan* should not have had a greater portion of the £40,000. I purpose being at *Swansea* on Tuesday next and a few following days, and will call upon you." Not one word as to its being said in his presence that the money was to be paid. Is it possible, therefore, to come to the conclusion that *Norton* would have had the audacity to write such a letter if he had known the fact to be at variance with his statement. I confess this is one of my difficulties in the case; but I must also assume that the letter written to *Cooper* was seen by his co-pur-

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chasers, and if *Cooper* had not the sagacity to see that his answer was not a proper one, there was *Goulton*, who has sworn here so positively as to *Norton's* knowledge of the fact, and surely he would have written expressing his astonishment and disgust that such a statement should have been made diametrically opposed to the fact, and when *Norton* was himself the person to tell the purchasers to go and pay *Crispe* the £10,000.

Therefore, in this conflict of evidence, with positive statements on both sides, but with the discrepancies I have stated, I feel myself bound to say the impression made upon my mind is that the whole six gentlemen were so utterly inaccurate in their recollection in everything they ought to have remembered, all the little incidents which go to test the value of memory, and remembered so little of what took place on the journey, so little of what took place at *Swansea*, and above all, so little of what took place when these affidavits were sworn by them, that I am obliged to come to the conclusion that accuracy is on *Norton* and *Morgan's* side, and inaccuracy on the part of these gentlemen. The value of testimony is not to be decided by the number of witnesses called, but by all the circumstances of the testimony. Here are six one way, and there are strictly only two on the other, but when there is that conflict of evidence, the circumstances will turn the scale; and upon all the circumstances I come to the conclusion that I am bound to believe the statement of the Plaintiff and his witnesses rather than that of the Defendants, and the scale is finally turned in my mind by that correspondence.

There is another very remarkable fact in this case, that a statement which was so conclusive was not stated in the answers. This is a thing which must have been known to *Donague*, who was present. *Donague* was the solicitor who prepared the answers, and it was such a damning fact, if correct, to *Norton's* case, that one does not understand why it was not put in the answers. If it had not been for the great expense and delay already incurred in this litigation, I confess I would rather have sent the question to a jury; but I do not feel myself warranted in doing that, unless both parties request me to do so; and not being requested, I must form my own conclusion.

On the whole I come to the conclusion that the truth is on the

side of the Plaintiff, and that there was not from the commencement of this business on the 6th of May, down to its conclusion on the 28th of October, any communication whatever to *Morgan* or his adviser of the truth of the transaction that £40,000 was to be paid for this colliery, instead of £30,000, as described in every document relating to it; and particularly in the letter of the 11th of September, in which *Goulton*, on behalf of himself and partners, and co-adventurers, accepted the contract with *Crispe* for £40,000. If they had simply communicated that document, the whole difficulty would have vanished, and there would have been no litigation upon the subject, except that *Morgan* might possibly have refused to complete the contract, and in that event *Crispe* might perhaps have been imprudent enough to file a bill for specific performance of the contract constituted by the letters of the 6th and 29th of May. However, nothing of the kind takes place. Then, that being the case, I find that there was a systematic plan between *Crispe* and *Elford* to conceal the real transaction from *Norton*. Mr. *Cookson* has been very severe upon the terms of the bill. He said it charged collusion and fraud, and so it does, and, as I understand, collusion in this matter is fraud, because, if *Elford* colluded, that is, contrived and planned with *Crispe* to conceal from *Morgan* the fact that his colliery had been sold for £40,000, that was collusion in the meaning of this Court, and collusion in such a matter is fraud. How far these gentlemen blinded themselves to the real transaction I do not know. *Elford* may, perhaps, be excused for not being sufficiently alive to the delicate and refined doctrine of this Court upon the principles which guide men in transactions with each other. He is put forward as a man of business. I take him to be so. I have had the advantage of hearing him cross-examined, and he is not deficient in capacity or experience, and it does surprise me that being a merchant as he is, engaged in a large way of business, that it never occurred to his mind how grossly improper it was that he, representing *Morgan*, should have bargained for a *douceur* from *Crispe*. *Crispe*, who was qualifying to be a member of the Bar, ought to have known that this sort of bargain for buying other men's estates, which he had no means of paying for, is a practice which is most reprehensible. It is plain from all these transactions

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that *Crispe* was bargaining for this estate simply in the expectation of making an increased price by it, profiting at another man's expense, and entering into a contract which he had no means of performing, the performance of it therefore resting entirely upon the accidental circumstance of his finding a sub-purchaser. He might have tied this property up, at a period when *Morgan* might have sold it to advantage, while he was haggling about this increased price, a practice upon which I cannot express anything but disapprobation; I find from the beginning to the end, from the day the offer was made, and most improperly made, in my opinion, by *Elford*, on the 6th of May, down to the acceptance on the 29th of May; from its acceptance on the 29th of May down to the sub-purchaser's being finally bound in September, the correspondence was one strenuous effort on the part of *Elford* to induce *Crispe* to bind the bargain by paying a deposit; and finding that that was not done he always sided with *Crispe*, as I can conclude, only for the purpose of obtaining an advantage by it at the expense of *Morgan*, his employer.

I think, therefore, it is established that there was a collusion of a fraudulent nature between *Crispe* and *Elford*, and that *Elford* has grossly failed in the performance of his duty to his client; and I confess that although I am satisfied upon the evidence, as far as I have seen it, that *Elford* has not received any part of the £10,000 which was paid to *Crispe*, he did his best to get part of it, although he swears that he failed. It appears that *Crispe* so far broke his engagement, that he told him he had given *Noble* £1000, and afterwards put him off with £25 only. I cannot avoid coming to the conclusion that these efforts were made from the beginning to the last to conceal the facts from *Morgan*, and the result is that *Morgan* has been made to part with his property for £10,000 less than the value, and the £10,000 which ought to have found its way into his pocket has, by means of the practices of *Crispe* and *Elford*, gone into *Crispe's* pocket.

I confess, upon the whole, I see no way to relieve them from the payment of that money which *Morgan* ought to have received. I must, therefore, make the decree as asked: That the Defendants may be declared jointly and severally liable to pay, and may be ordered by a short day to pay, the Plaintiff the said

sum of £10,000, with interest thereon as from the date of the payment thereof by the said purchasers up to the time of payment thereof to the Plaintiff at the rate of £4 per cent., and the Defendants must be ordered to pay the costs of the suit. C. A. 1876 MORGAN v. ELFORD.

The Defendants severally appealed from this decree, and the appeal came on to be heard on the 23rd of May, 1876, and was continued on the 24th and 25th of May. C. A.

Higgins, Q.C., and *Everitt*, for *Elford*, and *Cookson*, Q.C., and *Kisch*, for *Crispe*, when the evidence and correspondence had been read, were stopped by the Court, who called on counsel for the Plaintiff to shew that *Elford* was an agent employed to sell for the best price. Argument.

Cotton, Q.C., and *Romer*, for the Plaintiff:—

Our case is that the letter of the 6th of May did not express the terms finally agreed upon, which were that *Elford* should sell for the best price he could get, not being less than £30,000, and should have the fixed remuneration of £5000. *Elford* then professed to enter into a contract with *Crispe*, the validity of which the Plaintiff disputed, as was well known to both of them, and with this knowledge they conceal the sub-sale, and induce the Plaintiff to enter into a fresh contract for the sale to *Goulton* and others for £30,000. The case comes within the principle laid down in *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Company* (1).

JAMES, L.J.:— Judgment, C. A. James, L.J.

Without having heard the Appellant's counsel at length, we have called upon the Respondent to support the decree of the Court below, and having heard the whole of the evidence brought forward on the part of the Plaintiff, and some of the cross-examination of the Plaintiff and the Plaintiff's witnesses, and having also, which to my mind is more important, heard the whole of the correspondence read from beginning to end, and having heard all that Mr. *Cotton* could urge in support of the decree, we do not

(1) Law Rep. 10 Ch. 515, 526.

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find it necessary to consider whether, supposing the Plaintiff's story as alleged by the bill to be true, such relief as has been given in this suit could have been the proper relief to be given; nor is it necessary for us to consider the various points suggested in the course of the argument of counsel as to what took place upon and prior to and with a view to the execution of the contract. Assuming that the Plaintiff is relieved from the responsibility of proving the gross conspiracy which he alleges to have existed from the beginning of the transactions between *Elford* and *Crispe*, still upon any view of the case, whether it be the view of the case suggested by the bill, or the view of the case totally different from the bill itself which was suggested by Mr. *Cotton*, still for the Plaintiff to succeed it is absolutely essential for him to prove that *Elford* was in a fiduciary position towards him with respect to this property.

Now, whatever may be said of the word "agent," whatever may be said of the word "commission," or whatever may be ordinarily implied by the use of the word "agent," I am satisfied that in this case there was nothing in the nature of a fiduciary relationship subsisting between *Morgan* and *Elford*. *Morgan* and *Elford* had had a long correspondence before the letter, which is the cardinal letter in the case, was written, and that was a correspondence in which *Elford* said to *Morgan*, "I think you want to sell your property. I think I can find a purchaser for it." *Elford*, not being at that time in the employment of *Morgan*, and knowing nothing of the property or its capabilities, and knowing nothing of the value of the property except what any person living in that neighbourhood might have known as to the value of an anthracite colliery so situated in that period of excitement which existed in the beginning of the year 1873, and which excitement arose from the then price of coal, says, "I think I can in the present state of things find you a purchaser for your colliery." The correspondence goes on. *Morgan* first of all asks £45,000. *Elford* says, "It is no use asking that," and then, after various letters had passed between them, all of them being letters between parties at arm's length, and there being no relationship between them at all until that which was created by the letter of the 6th of May, 1873, *Morgan* writes to *Elford* this letter:—"Dear Sir,—I am now at liberty

and disposed to sell to your friend at £25,000 cash. You may have a month or six weeks to negotiate with him. What you get above £25,000 you may have by way of commission. Of course, I reserve to myself the right of selling without being liable to any commission or expenses, provided you do not effect a sale with your friend during a month or six weeks." That was really the bargain between them, and nothing ever occurred between the parties to alter that bargain. He says, "I am not going to employ you so as to incur any expense whatever on your part," but he says, "I agree that you shall find me a purchaser, but you are only to find me that purchaser on giving me £25,000 net, and you may get your profit how and where you like. I have nothing to do with that, but whatever you do get above the £25,000 you may have for yourself, and whether that is by way of commission or not, that is what you are to have for your remuneration for the trouble of finding me a purchaser." That was the original bargain entered into between the parties on the 6th of May. Then it was that *Elford* requested that that letter should be divided into two letters, and he did so for a very obvious reason. He said, "It will not do for me to go and let people know that you are willing to sell for £25,000, because I want £5000 commission at the very least, and I will not set about the matter at all unless I see my way to get £5000 at the very least, therefore I must request you to divide this letter into two, one letter offering to sell to me for £30,000 cash, in which of course I have no objection to your putting in the words, Of course I reserve to myself the right to sell without being liable for any commission if you do not sell within the month." And then a second letter to this effect, that "if through you I dispose of the collieries for £30,000 cash in a month or six weeks from this date, I am willing to allow you £5000 from that sum as commission." All he says is obviously without departing in the slightest degree from the previous arrangement, or intending to vary the letter of the 6th of May. "Bring me £25,000 cash, that is all I want you to do, and that is all you have got to do." Then there was a great deal of correspondence afterwards between *Elford* and *Crispe*, the alleged conspirator with *Elford*, who were at arm's length as to the amount *Elford* was to get from *Crispe*, and it ends in this, that when the bargain is made, apparently by *Elford*, on behalf of *Morgan*,

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with *Crispe, Morgan*, through his solicitor, steps in, and he then takes the matter into his own hands, and says, I do not acknowledge the contract that you have made, and I say it is not binding upon me, and he then says to *Crispe*, "Contract or no contract, bring the £30,000, and you shall have the property, that is all I care about." *Morgan*, out of the £30,000, would of course have to pay the £5000, which he had agreed to do, to *Elford*, who had introduced the purchaser to him, and *Morgan* says, "Pay the £25,000 to me, and the £5000 to Mr. *Elford;* all I care about is my £25,000." Thereupon *Crispe* does find the £30,000, brings down some people with him to *Swansea* who execute a contract, by which it is agreed to give *Morgan* £30,000 for the property, and *Morgan* thereupon sells the property for £30,000.

It appears to me that the bill in this case is wholly without foundation, independently of the gross suggestions of fraud with which it is stuffed, and as apparently a very strong opinion was expressed with respect to *Elford* in the Court below, I feel it right on my part to express my unhesitating and unqualified opinion that in what *Elford* has done in this matter he has done nothing as between him and the Plaintiff inconsistent with the nicest sense of honour, or with the most scrupulous integrity.

I am of opinion that the bill must be dismissed, and dismissed with costs.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am entirely of the same opinion.

As the Lord Justice has said, this bill is overlaid with charges of the grossest character against the two gentlemen who are made Defendants to it. It starts with an allegation that the Plaintiff was ignorant of the value of colliery property, and of this property in particular, and that the Defendants, knowing the real value of it, colluded together with a view to induce him to sell the property for a sum much less than its real value. It appears from the evidence that the Plaintiff has been engaged himself in colliery businesses for upwards of forty years, and that he has owned this particular colliery for twelve years, and that in addition to that, being willing to sell the colliery at the close of 1872, and asking as much as £45,000 for it, there were subsequently two valuations made, upon one of which valuations a well-known

solicitor made an offer of £18,000 on behalf of a client, and the other of which valuations was made at the Plaintiff's own instance as late as the month of March, 1873, in which valuation the value was fixed at £24,500. It was after he had received that valuation of the property for £24,500, that he authorized *Elford* to sell the property for £25,000, that is to say, at something exceeding the price at which it had been valued by his own valuer. As the Lord Justice has pointed out, if he could have brought £25,000 in cash, he might have had all the rest by way of commission. It appears to me that from that time forth the negotiations between *Elford* and *Crispe* proceeded upon that footing, and there was ultimately a contract between *Elford* on the one hand and *Morgan* on the other for the sale of the property to *Crispe* for £30,000, out of which *Morgan* bound himself to pay a commission of £5000 to *Elford*.

Judgment, C. A. Baggallay, J.A.

I can see nothing whatever to support the various charges which have been alleged against these gentlemen of fraudulent conduct. It appears to me, not only that those charges are not proved, but that they are disproved, by the evidence in the case. I should not, perhaps, have made this last observation, had it not been for the fact that the Vice-Chancellor took a different view of the case, and, at the close of his judgment, expressed himself to the effect that fraudulent collusion between the Defendants *Crispe* and *Elford* had been established, and that the Defendant *Elford* had grossly failed in his duty, and I think it only fair to the Defendants to say that I take an entirely different view of the evidence.

LUSH, J.A.:—

Lush, J.A.

I entirely concur with my learned brethren in the judgment they have pronounced. All I am desirous of adding is, that in my opinion the decree of the Court below was based upon an entire misconception of the evidence, and I can see no ground whatever for any one of the imputations contained in the bill against either of the Defendants.

JAMES, L.J.:—

The bill will be dismissed with costs, including the costs of the appeal.

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The Plaintiff presented an appeal to the House of Lords. The Defendants respectively taxed their costs, and issued execution, under which the sheriff seized the goods of the Plaintiff.

Statement.

Dec. 14. On this day an application was made by the Plaintiff that the Defendants *Elford* and *Crispe* might be restrained from enforcing execution, or otherwise proceeding to enforce the certificate of taxation; and that all proceedings under the order made by the Court of Appeal on the 25th of May, 1876, dismissing the bill, might be stayed pending the appeal to the House of Lords, on the Plaintiff paying into Court such sum as the Court might direct.

Argument.

Romer, for the application, referred to *Cooper* v. *Cooper* (1), and the cases there cited.

Higgins, Q.C., and *Everitt*, for *Elford*:—

The general rule is laid down by *Merry* v. *Nickalls* (2), and *Cooper* v. *Cooper* does not vary it. The costs must be paid, the solicitor personally undertaking to refund if the order should be reversed.

Cookson, Q.C., and *Kisch*, for *Crispe*.

Judgment.

JAMES, L.J.:—

I am of opinion that we cannot alter the practice established by *Merry* v. *Nickalls*. The Defendants, of course, will be liable to repay these costs if the order is reversed, and their solicitors giving their personal undertaking to repay in the same event, the costs must be paid. The solicitors giving such undertakings, the motion must be refused.

BAGGALLAY, J.A., and BRETT, J.A., concurred.

Solicitors: *Gover & Norton; Hacon & Turner; Edmund F. & Benn Davis.*

(1) 2 Ch. D. 492. (2) Law Rep. 8 Ch. 205.

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M. R.

[1872 H. 30.]

1876. Nov. 20.

Administration Suit—Executors—Partial Distribution before Suit—Mistake—Incorrect Accounts—Liability of Executors—Costs.

Where executors have made a proper distribution *pro tanto* of their testator's estate, and have been ready to produce proper accounts to the unpaid residuary legatees, and an administration action is then instituted by the unpaid residuary legatees, and it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it.

But where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; and, secondly, in expending part of the general personal estate in repairs of property specifically devised:—

Held, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each.

Form of Order.

FURTHER CONSIDERATION.

Statement.

Thomas Brewitt, by his will, dated the 11th of December, 1855, after making various specific devises and bequests, gave his residuary real and personal estate to his executors upon trust for his grandchildren in equal shares as tenants in common when and as they should respectively attain the age of twenty-one years. At the date of his death, which happened on the 22nd of June, 1857, the testator had five grandchildren, one, *Clement Hilliard*, being an infant. A sixth grandchild, *Harold Hilliard*, was born after the death. The executors, supposing that according to the true construction of the will the five grandchildren who were living at the testator's death were alone entitled under the residuary gift, divided the residuary estate, which they represented as amounting

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to £3750, into five equal shares, and paid four of such shares, consisting of £750 each, to the four adult grandchildren (who thereupon executed releases of their shares), and retained the remaining share for the benefit of the fifth grandchild, *Clement*. Shortly afterwards applications were made by the guardian of the two infant grandchildren, *Clement* and *Harold*, to the executors for accounts, which, however, they refused to render, whereupon the bill in this suit was filed by the infants, by their next friend, for the administration of the testator's residuary estate, and for the usual accounts, and praying costs against the Defendants, the executors. *Harold Hilliard* was afterwards made a Defendant by amendment.

The suit came on for hearing on the 5th of July, 1873, before Lord *Selborne*, sitting for the Master of the Rolls, when an administration decree was made declaring that all the six grandchildren of the testator were entitled to share equally in his residuary estate, but no order was made as to costs.

On taking the accounts directed by the decree, the executors were charged with a sum of £1095 which had by mistake been expended by them out of the general personal estate in the repairs of certain houses forming part of the real estate specifically devised.

The £750 constituting the share of the infant *Clement Hilliard* retained by the executors, had been paid into Court and invested in consols.

The cause now came on for hearing on further consideration, the question being how the costs were to be borne.

Argument.

Chitty, Q.C., and *Nalder*, for the Plaintiff:—

This suit was occasioned by the refusal of the executors to render proper accounts, and it now turns out that they made mistakes both in distribution and account. Under these circumstances, though it may be admitted not to be a case in which the executors should be ordered to pay the whole costs of the suit, still they ought not to be entirely relieved from the consequences of their mistakes. The case should, we submit, be treated as if no distribution had taken place, the distributed shares being brought into account, so that the shares of the Plaintiff and infant De-

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fendant will each be chargeable with one-sixth only of the costs. In *Mackenzie* v. *Taylor* (1) and *Thompson* v. *Clive* (2), where there had been partial distribution, and the Plaintiffs, who were entitled to the shares remaining undistributed, filed bills against the executors for administration, Lord *Langdale* ordered the costs to be paid out of the Plaintiffs' shares alone, but that was because the executors' accounts turned out to be substantially correct, which is not the case here. But even where the accounts were substantially correct it was held by Lord *Romilly*, in *Gravatt* v. *Tann* (3), that the executors, who were also residuary legatees and had retained their shares, must bring in and account for the shares they had retained before they could receive their costs.

Argument.

Waller, Q.C., and *Dauney*, for the Defendants, the executors:—

As regards the Plaintiff, his £750 is secured, and the share he will ultimately receive after payment of the costs chargeable thereon cannot exceed that sum. This is, therefore, useless litigation as far as he is concerned. As to the infant Defendant, we ought to have our costs up to the hearing paid out of his estate, for he had the benefit of the decision of the Court upon the construction of the will. If the Plaintiff's view is acceded to we shall virtually be called upon to pay out of our own pocket for having the will construed. At all events, we submit that, under the circumstances, we are entitled to deduct our costs, charges, and expenses from the balance which has been found due from us: *Ottley* v. *Gilby* (4).

Street, for the infant Defendant.

JESSEL, M.R.:—

Judgment.

The case is one of some novelty, and though I think it must have occurred before, I am not aware of it. The question is, what is the proper rule as to the incidence of costs where executors have, as in this case, *bonâ fide* divided the residuary personal estate only partially—partially only in this sense, that some of the legatees having attained their ages, were entitled to call for their

(1) 7 Beav. 467.
(2) 11 Ibid. 475.
(3) Law Rep. 7 Eq. 436.
(4) 8 Beav. 602.

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shares, and the executors, upon being asked for them, made up their accounts and paid them before suit?

Now the facts, so far as it is necessary to state them, are very few and simple. There were six residuary legatees. The executors made a mistake as to the construction of the will and thought five only were entitled to participate, and they made up their accounts upon that footing. When four of them attained the age of twenty-one—one being an infant—they divided the estate, and paid over what they considered to be four-fifths of the residue, and retained the infant's share. Afterwards the infant—being still an infant—filed a bill to have the accounts taken, and made this other child, who was supposed not to be entitled to a share, a co-Plaintiff, though he was ultimately made a Defendant. The cause came to a hearing before Lord *Selborne*, sitting for the Master of the Rolls, and he decided that the executors were wrong in their construction of the will, and that all the six grandchildren were entitled to participate. They certainly divided the estate upon a wrong footing. No order was made as to costs. The accounts were taken in Chambers, and it was found that the executors were wrong also in their discharge. They had claimed a sum of £1095 in their discharge for money which it turned out had really been laid out by them, but through some mistake it had been laid out in repairing houses forming real estate which belonged, not to the residuary legatees, but to the specific devisees. Consequently, when they got into Chambers, the mistake was set right, and they were charged with the sum of £1095; so that, on taking the account, the result was that their accounts were substantially wrong, but there was no imputation of dishonesty or intentional impropriety of conduct upon the part of the executors.

The suit now comes on for hearing on further consideration; and it seems that, after paying all the costs of the suit, the result will be that the executors will have paid probably more than their shares to the adult residuary legatees; that is, if the estate were now to be distributed, they would not get as much as £750 each. The question is, who is to make good the difference? That is really what it comes to. It appears to me, under such circumstances, the right rule is, that the executors who made the mistake in the distribution of the fund cannot be allowed to say that the

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accounts are substantially correct, and that they have made a fair distribution, and that the Plaintiff should pay the costs of the suit. It is clearly a case in which the suit has been properly instituted. I quite agree, where executors have made up their accounts carefully and in a proper manner, and have kept vouchers so as to have them always ready to be seen, and have divided the residue partially—that is, given the shares to those who are adult—without suit, it would be unreasonable to make them pay a proportion of the costs of a suit subsequently instituted by some of the other residuary legatees; for the result would be that no executors would ever divide an estate without instituting a suit. Supposing there are ten residuary legatees, nine of whom are of age and one is an infant (and possibly one may be a married woman with a settlement, or something of the kind), and the executor distributes the shares of the adult legatees, and supposing that at some subsequent period somebody institutes a suit and asks that all the costs may be thrown upon the estate in the same manner as if no distribution had taken place, the executor might say, "If the Plaintiff's view is right I shall have to make good out of my own pocket the share of costs attributable to each residuary legatee." It is obvious that such a rule would be in the highest degree inconvenient. To use a common phrase, it would throw every estate in the kingdom into Chancery, which no one would desire, least of all the Judges of the Chancery Division.

Now that being so, I think the rule must be that where the executors have properly distributed the estate and are ready to shew the accounts, and also proper vouchers, to the residuary legatees, or to the guardian of an infant—if there are infants—and an administration suit is then instituted, and it turns out that the accounts are substantially correct, the costs of that suit ought to be borne by the shares of the parties who institute and take the benefit of the litigation—that is, the remaining shares. As I read the authorities, namely, the cases of *Mackenzie* v. *Taylor* (1) and *Thompson* v. *Clive* (2), both of which were before Lord *Langdale*, that was the view he took of the law, although it is not so clearly stated as would be desirable in order to shew what the rule was. But where, as in this case, the accounts are substantially

(1) 7 Beav. 467. (2) 11 Beav. 477.

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incorrect, and where the executors have made two most serious mistakes, one in choosing to take upon themselves the office of the Court in construing an obscure will, and construing it wrongly, and secondly, making so serious an error as laying out as much as £1095 in repairing a freehold which did not belong to their *cestuis que trust*, I think the executors cannot be allowed to say that the distribution is a proper distribution, and that it ought to avail them when the accounts come to be subsequently taken. I think they must stand in the same position as if there had been no distribution at all. Therefore I think the right order is that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the Plaintiff and the infant Defendant will be entitled to exactly the same shares out of the residuary estate as if no distribution had taken place and the other residuary legatees had been made Defendants. Of course you cannot make those other residuary legatees pay back anything. There is no pretence for saying that they can be compelled to come in and contribute. Therefore the difference, which I think cannot be very large, will in substance have to be made good by the executors who wrongly distributed the estate: they who have made the error will have to pay for it. Upon these grounds I think justice will be done. The simplest plan will be to order the Defendants, the executors, to pay the costs of the Plaintiff and the infant Defendant, and to make good the necessary amount after allowing their own costs, charges, and expenses, to be taxed in the usual way. The net residue will then be ascertained, and the executors will make good the amount of the two-sixths by payment into Court of the balance found due. When that is ascertained, it can be inserted in the order without going to Chambers, and the interest will be at the rate of £4 per cent. from the time of distribution, credit being given for any interest the executors have paid.

The minutes of the order were to the following effect:—

Tax the costs of all parties as between solicitor and client, including in the costs of the executors their charges and expenses properly incurred. Distinguish the party and party costs of the Plaintiff and infant Defendant. Order the executors to pay the costs of the Plaintiff and infant Defendant as between

party and party out of the balance found due from them within fourteen days after the Taxing Master's certificate. Treat the costs which the executors are to pay as above, and their own costs, charges, and expenses as payable out of the testator's entire residuary estate (consisting of the £3750, the consols in Court, and the balance found due from the executors, with any return for overpaid probate or legacy duty), and let the executors pay into Court the balance which, with the consols in Court, will make up to the Plaintiff and infant Defendant the full amount of a sixth share of residue each. The executors to be charged with interest at £4 per cent. on the infant's shares from the date of the release, and to have credit for any sums properly paid for maintenance or education of the Plaintiff and infant Defendant. The extra costs of the Plaintiff and infant Defendant to be paid out of their shares, and the ultimate balances to be carried to their respective separate accounts.

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Solicitors for Plaintiff and infant Defendant: *E. Woodard.*

Solicitors for Defendants, the Executors: *Austen, De Gex, & Harding.*

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Borough Corporation—Power of Sewering Streets—Private Road—Compulsory Powers—Local Act—Special and General Provisions—Saving of General Rights—"Street"—Vesting Sewers in Corporation—Property in Subsoil—Easement—Interpretation of Statutes—Consolidation Acts—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 45—*Sewage Utilization Act*, 1865 (28 & 29 *Vict. c.* 75), *s.* 4—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 16.

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The Plaintiffs were owners of a private road in the borough of *Oldham*, called *Shaw Road*, having a row of houses along and fronting each side.

The *Oldham Borough Improvement Act*, 1865,—the preamble of which recited that, for the sake of convenience, it was intended to reduce into one Act such of the provisions of the *Public Health Act*, 1848, and the *Local Government Acts*, 1858 and 1861, as were then applicable to the borough—enacted as follows:—Sect. 4 discontinued the application of such provisions to the borough; sect. 16 empowered the borough corporation to order any private street (including "road") to be sewered by the owners of land in the street, and (sect. 18), in case of default, to sewer it themselves at the expense of such owners; sect. 27 provided (sub-sect. 1) that the corporation might purchase all private rights in "the road or street called *Shaw Road*"; (sub-sect. 3) that on completion of such purchase "the said road or street" should be subject to all the provisions relative to the sewering of streets in the borough; (sub-sect. 4) that the power of compulsorily purchasing such rights should not be exerciseable after five years; and (sub-sect. 5) that nothing in the Act should empower the corporation to purchase or take by

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compulsion any interest in the soil of the said road or street; sect. 59 vested all sewers in the corporation; sect. 60 empowered the corporation to make "under any streets" sewers necessary for the drainage of the borough; sect. 62 provided for compensation; and sect. 366 saved such general rights as the corporation had "independently of that Act."

The local Act omitted all notice of the *Sewage Utilization Act*, 1865, which had been passed only six days previously, and which empowered corporations to construct such sewers as they might deem necessary, and for that purpose to exercise all the powers of constructing sewers vested in local boards by sect. 45 of the *Public Health Act*, 1848, which empowered any local authority to carry any sewer under any "street" (including "road") "or place laid out as or intended for a street."

The *Public Health Act*, 1875, which repealed the *Public Health Act*, 1848, and the *Sewage Utilization Act*, 1865, consolidated their provisions, sect. 16 substantially re-enacting sect. 45 of the Act of 1848.

In 1876 the corporation of *Oldham*, having issued an order, which was not complied with, that *Shaw Road* should be sewered by the owners, commenced excavating the road for the purpose of constructing a sewer themselves, without any previous agreement for the purchase of the Plaintiffs' rights in the road:—

Held, upon motion by the Plaintiffs for an injunction, 1, that, having regard to the special provisions of sect. 27 of the local Act, the corporation's proceedings were not authorized by sects. 16 and 18, or sect. 60, of that Act; 2, that their proceedings were authorized by the saving clause (sect. 366) of that Act, the powers under the *Sewage Utilization Act*, 1865, having been thereby preserved to them, and continued by sect. 16 of the *Public Health Act*, 1875; and, 3, that *Shaw Road* was a "street" within the *Public Health Act*, 1875.

Motion therefore refused.

The preamble of an Act of Parliament cannot be resorted to in order to ascertain the intention of the Act, unless there is an ambiguity in the enacting part.

General provisions in an Act of Parliament do not override special provisions; so that where an Act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other Act.

The usual clause in local Acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage.

The principles of interpreting and reconciling Acts of Parliament considered.

Statement.

IN the year 1837 a piece of land in the township of *Oldham*, 895 yards in length, was sold and conveyed to the Plaintiffs as a site for an intended carriage and foot road. The road was completed in the same year under the name of "*Shaw Road*," and a toll-bar was placed across it, at which tolls had ever since been taken by

the Plaintiffs for traffic passing over the road, the road being maintained and kept in repair by them and at their expense. Eventually a row of houses was erected by the owners of the adjoining lands along and fronting each side of the road, the whole being within the borough of *Oldham*. What precise rights (if any) the owners or occupiers of these houses had over the road did not appear, but it was said that, as a matter of fact, they, as well as foot-passengers in general, were in the habit of using it free of toll.

The houses—which were inhabited by persons of the poorer class—being deficient in proper drainage, in May, 1876, the Defendants, the Corporation of *Oldham*, purporting to proceed under the *Oldham Borough Improvement Act*, 1865, posted up a notice or order in *Shaw Road* requiring the owners of buildings or lands in the "street" to sewer and drain it, and inserted advertisements in the local newspapers to the same effect.

No steps having been taken by the Plaintiffs or any other persons to comply with the order, the corporation, in September, 1876, still claiming to proceed under their Act, commenced making excavations in the road for the purpose of constructing a sewer thereunder, which was intended to form part of the main drainage system of the borough, according to plans prepared by the engineer and surveyor to the corporation, whereupon the Plaintiffs issued the writ in this action, claiming an injunction to restrain the Defendants from continuing these proceedings on the ground that they were not authorized by the Act.

The Plaintiffs now moved for an injunction accordingly.

The main questions for argument rested on the construction and effect of various sections in the *Oldham Borough Improvement Act*, 1865, the *Sewage Utilization Act*, 1865, and the *Public Health Act*, 1875.

The several enactments which were commented on or noticed in the course of the argument and judgment are, so far as it is necessary to state them, as follows:—

The *Oldham Borough Improvement Act*, 1865, which received the Royal Assent on the 5th of July, 1865, recites a former local Act, and that divers parts of the *Public Health Act*, 1848, and the *Local Government Acts*, 1858 and 1861, relative to sewerage and drain-

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age, management and improvement of streets, and other matters of local government, had been adopted and applied by the corporation to and were then in force in the borough; that it was highly inconvenient for the borough that there should be in force therein a variety of provisions affecting its improvement and government comprised in different Acts not harmonizing in their language, and frequently conflicting in their effect, and that it was, therefore, expedient to reduce into one Act the enactments in force relative to the improvement and government of the borough, and to simplify and amend them, and also to extend the powers of the corporation relative to matters of local government. It then contains the following provisions:—

The interpretation clause, sect. 3, defines the word "street" as including "the whole or any part of any street, road, lane, carriageway, . . . thoroughfare, footway, or pathway."

Sect. 4 repeals the former local Act, and declares that the parts of the *Public Health Act*, 1848, and the *Local Government Acts*, 1858 and 1861, adopted and applied to the borough as aforesaid, shall cease to apply to the borough.

Sect. 16. "If at any time any street or court (not being a highway repairable by the inhabitants at large) formed, set out, or laid out, either before or after the commencement of this Act, is not sewered . . . to the satisfaction of the corporation, they may at any time, and from time to time, order that it be . . . sewered . . . with sewers . . . of such dimensions . . . as the order directs, and thereupon the respective owners of the buildings and lands in such street or court shall at their own respective expense . . . sewer . . . such street or court within the time and in the manner prescribed by the order."

Sect. 17 provides that every such order shall be published in a local newspaper and publicly posted in the street to which it relates, and that such publication shall be sufficient notice to all parties interested; and,

Sect. 18, that in case of neglect to comply with such order, the corporation may "sewer . . . the street or court to which the order relates . . . in such manner as they think fit;" the work to be done at the owners' expense.

Sect. 20 enacts that when any street has been sewered and

completed to the satisfaction of the corporation, they shall declare the same to be a public highway, unless the majority of the owners of buildings in the street shall object thereto in writing, and that from and after such declaration such street shall be a public highway and be repairable accordingly.

Statement.

Sect. 27. "With respect to the road or street called *Shaw Road* the following provisions shall take effect, namely:

"(1.) The corporation may purchase and take all private rights of way and other rights in, over, or affecting the said road or street, and all rights of levying tolls in respect of traffic thereon, and the interests of all persons in any tolls so levied, and all gates, posts, buildings, and erections in, on, or over any part of the carriageway or footway of the said road or street:

"(2.) For the purposes of such purchase and taking, all the rights and interests aforesaid shall be deemed to be lands within the meaning of this Act and of any Act incorporated herewith:

"(3.) On the completion of such purchase and taking, all the rights and interests aforesaid shall be by virtue of this Act absolutely extinguished, and the corporation shall remove and abate all gates, bars, posts, buildings, erections, or other obstructions then existing in, on, or over any part of the carriageway or footway of the said road or street, and thenceforth the said road or street shall be and continue a street open to the passage of the public, and free from encroachment, and shall be subject to all the provisions relative to the sewering . . . or otherwise completing of streets not being highways repairable by the inhabitants at large:

"(4.) The powers of compulsory purchase of the rights, interests, and property aforesaid by the present section conferred on the corporation shall not be exercised after the expiration of five years after the commencement of this Act"—the 8th of November, 1865.

"(5.) Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street."

Sect. 59. "All existing and future public sewers and drains within the borough, and all existing and future sewers and drains in and under the streets and courts, with all the works and materials thereunto belonging, whether made or provided at the

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cost of the corporation or otherwise . . . shall vest in and belong to the corporation . . ."

Sect. 60. "The corporation may from time to time make under the streets the sewers necessary for the effectual drainage of the borough . . . and if for effecting any of the purposes aforesaid it is expedient to carry or construct any works through, under, or upon any lands within or beyond the borough, the corporation may so carry or construct the same accordingly, and remove all obstructions thereupon or thereunder."

Sect. 62 provides that if the owner or occupier of any lands is injuriously affected by the exercise of the powers relative to sewers conferred by the Act upon the corporation, the corporation shall pay him compensation in respect thereof.

Sect. 366. "Nothing in this Act shall take away or abridge any right, power, or authority which the corporation have or may enjoy under the Municipal Corporation Acts, or otherwise independently of this Act."

By the *Sewage Utilization Act*, 1865, which received the Royal Assent on the 29th of June, 1865, six days only before the passing of the above-mentioned local Act, and to which no express reference was made by the latter Act, it was enacted as follows:—

Sect. 4. "Sewer authorities" (including borough corporations) "shall have power to construct such sewers as they may think necessary for keeping their district properly cleansed and drained, and shall, as respects all sewers constructed by them or under their control, whether the same were made before or after the passing of this Act, have all the powers that local boards have, in respect of sewers vested in or constructed by them under the 45th and 46th sections of the *Public Health Act*, 1848 . . ." (1)

(1) Sect. 45 of the *Public Health Act*, 1848, enacted that local boards "shall cause to be made such sewers as may be necessary for effectually draining their district . . . and . . . may carry any such sewers through, across, or under any turnpike road, or any street or place laid out as or intended for a street . . . and, after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary) into, through, or under any lands whatsoever . . ." By the interpretation clause (sect. 2) of that Act the word "street" was defined to include "any road, . . . lane, footway, square, court, alley, or passage within the limits of any district."

The *Public Health Act*, 1875, which was passed for the purpose of consolidating and amending the Acts relating to public health, contains the following enactments:—

Statement.

Sect. 4 defines the word "street" as including "any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

Sect. 16,—substantially re-enacting the provisions of sect. 45 of the *Public Health Act*, 1848. "Any local authority may carry any sewer through, across, or under any turnpike road, or any street or place laid out as or intended for a street . . . and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands whatsoever within their district . . ."

Sect. 150 empowers the urban authority by notice to require the owners or occupiers of premises adjoining "any street (not being a highway repairable by the inhabitants at large)," to sewer such street, and to execute the necessary works in case of non-compliance with such notice.

Sect. 299 enables the local government board to compel the local authority to sewer their district, in case of default.

Sect. 305 gives the local authority a power of entry upon lands for the construction of sewers and other works, and

Sect. 343 repeals various Acts relating to public health, including the *Public Health Act*, 1848, and the *Sewage Utilization Act*, 1865.

Argument.

Ince, Q.C., and *E. W. Byrne*, for the Plaintiffs:—

The corporation have not been proceeding in conformity with their Act as regards *Shaw Road*, which is a private road and subject to the special provisions of sect. 27 of the local Act. Under that section all rights and interests in the road must first be purchased or taken by the corporation before it can become a "street," and, as such, subject to the powers of the Act as to sewering. The period within which those rights and interests could be acquired compulsorily expired in 1870, and no purchase agreement has yet been entered into. But, independently of that section, this is not a "street" within the meaning of the Act, for it has never yet been dedicated to the public.

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They were then stopped by the Court.

Chitty, Q.C., and *Macnaghten*, for the Defendants:—

In the first place, this is a "street." It is a street in the ordinary sense of the term, that is, a road with a row of houses on each side of it, and it is in fact expressly termed a "street" in the 27th section of the local Act; it is, moreover, dedicated to the public to this extent, that foot passengers exercise a free right of way over it. But the term "street" is not necessarily confined to streets dedicated to the public: *Vestry of St. Mary, Islington*, v. *Barrett* (1). This being, then, in every sense a street, and it being necessary for the public health that this, as well as the other streets in the borough, should be effectually drained, we submit that we were entitled to proceed under sects. 16, 17, and 18 of the local Act, or under the comprehensive provisions of sect. 60, paying compensation under sect. 62. But it is not obligatory upon us to proceed under the local Act at all; we may elect to proceed under the *Public Health Act*, 1875, s. 16: *Earl of Derby* v. *Bury Improvement Commissioners* (2). Under sect. 299 of that Act we can, in fact, be compelled to make necessary sewers. Moreover, sect. 366 of the local Act expressly reserved to us all powers we then had independently of that Act. At the date of the passing of that Act our general powers included a power of making sewers, vested in us by sect. 4 of the *Sewage Utilization Act*, 1865, by reference to sect. 45 of the *Public Health Act*, 1848, which provisions are re-enacted and continued by sect. 16 of the *Public Health Act*, 1875. Sub-sects. 1, 2, and 3 of sect. 27 of the local Act have reference only to the purchase of the surface rights in *Shaw Road*. Sub-sect. 5, which is a saving clause, does not affect us at all, for it does not follow that in making a sewer, as we claim the right to do under our general powers, we are taking the soil; we are only acquiring an easement.

[JESSEL, M.R.:—This is not the case of a mere easement. The barrel of the sewer—that portion of the subsoil—vests in you under the 59th section of your Act.]

Then, if the vesting of the sewer constitutes a vesting in us of a

(1) Law Rep. 9 Q. B. 278. (2) Law Rep. 4 Ex. 222.

corresponding portion of the soil, that sub-section cannot be read literally, for it would then prohibit us from making any sewer at all under this road; and that would be inconsistent with sub-sect. 3, which says the road may be sewered on purchase of the surface rights. But we do not desire to purchase those rights, and we are not bound to do so, sub-sect. 1 being permissive only; we are, however, willing to pay compensation under the other provisions of the Act. On the whole, we submit that we are entitled to make this sewer under the local Act, or, at all events, under the general Act.

Ince, in reply:—

It seems clear that the proceedings of the corporation are not authorized by the local Act. Sect. 27 contains special provisions for the protection of our interests in this private road, and those special provisions, which override the general provisions of the Act, must first be complied with before there can be any interference with our rights. If, then, as I submit, the corporation cannot proceed compulsorily under the local Act, the question is, can they proceed under any public Act? It is true, sect. 16 of the *Public Health Act*, 1875, is substantially the same as sect. 45 of the *Public Health Act*, 1848, but the latter section, as well as the other sections of the Act of 1848 applicable to the borough, were expressly repealed by sect. 4 of the local Act. The object of the local Act was, as the preamble expresses it, "to reduce into one Act" all the enactments affecting the government of the borough contained in the then existing Acts relating to public health, and the saving clause (sect. 366) should therefore be read as reserving to the corporation only such rights outside the Act as were then subsisting under the Municipal Corporations Acts, or Acts of a like nature. With regard to the *Sewage Utilization Act*, 1865—which is not now in force, having been repealed by the *Public Health Act*, 1875—probably no one was aware of its existence at the date of the passing of the local Act, and the Legislature, in passing what was virtually a local consolidation Act, could never have intended that some of its most important provisions should be overridden and rendered nugatory through the operation of a mere saving clause upon an Act passed in the same session of Parliament. In short, the intention of the local Act, as shewn by the preamble, was that

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all proceedings relative to the sewering, &c., of the borough should be taken under that Act, and no other.

[JESSEL, M.R.:—You cannot resort to the preamble to ascertain the intention of an Act, unless there is an ambiguity in the enacting part. The words of the saving clause in this local Act are plain and comprehensive—"or otherwise independently of this Act."]

The principle is that public Acts do not interfere with the special provisions of private Acts. Another principle is that a general later law does not abrogate an earlier special one: *Thorpe* v. *Adams* (1); *Maxwell* on the Interpretation of Statutes (2).

Then, as regards the question whether *Shaw Road* is a "street" so as to come within the general provisions as to streets, our case is this: We have a close or strip of land with houses on each side, but not built on any part of it. There is, as we say, no unrestricted right of access on to our close from those houses, and we might at any time build a continuous wall on each side of the strip and so prevent any access. We might even erect buildings on it. How can this be a street when there is no liberty of access?

[JESSEL, M.R.:—It seems, however, to be what the 16th section of the *Public Health Act*, 1875, terms "a place laid out as or intended for a street."]

That cannot apply to a private piece of ground. To be a "street" it must be a place over which the public have a right of passage: *Curtis* v. *Embery* (3). I submit that, under the circumstances of this case, and having regard to the express provisions of the local Act, we are entitled to the injunction.

Judgment.

JESSEL, M.R.:—

I must say that this mode of deciding such cases as this is very inconvenient, for I am driven to decide upon motion an important series of questions as to the construction of some very long and complicated Acts of Parliament. For aught I know there may be numerous enactments and sections which may materially affect

(1) Law Rep. 6 C. P. 125. (2) Page 157.
(3) Law Rep. 7 Ex. 369.

the questions I have to decide, but to which nobody's attention has yet been drawn. Of course it is impossible for a Judge to do more than give his judgment upon the particular sections to which his attention has been called. When it is considered that one of these Acts, the local Act, has 367 sections, and another, the *Public Health Act*, 1875, has 343 sections, it may be imagined that in such a labyrinth it is quite possible that something material may have been overlooked. Subject to these observations, I must deal with the provisions of the Acts of Parliament to which my attention has been directed: I can deal with no others.

Now the first question I have to consider is, whether, independently of the local Act, there is any power in the corporation to do this particular thing, for it seems clear that if they have the power at all, it must be under the general Act. I cannot help thinking that the promoters of this local Act, which received the Royal Assent on the 5th of July, 1865, and which, according to the terms of the preamble, was intended to comprise all the Acts which in any way related to the local government of this borough with reference to streets, will be a little surprised to find that by reason of a public Act which received the Royal Assent a few days before, the whole of that intention was defeated so far, and that the corporation are therefore under the control of two Acts. I think, also, that those persons who were interested in claiming special exemptions and special provisions as regards their own particular lands will be a little surprised to find that by reason of the general saving in the local Act of all other powers as regards the corporation then existing, they were bound by the provisions of a general Act which, unknown to them, had received the Royal Assent a few days before. Whatever I may think of the extraordinary results which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must read them according to the ordinary rules of construction, that is, literally, unless there is something in the context or in the subject to prevent that reading. I find, then, in the 366th section of the local Act this provision: "Nothing in this Act shall take away or abridge any right, power, or authority which the corporation have or may enjoy under the Municipal Corporation Acts, or otherwise independently of this Act." An argument was addressed to me

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to the effect that that meant "Municipal Corporation Acts or other like Acts." I am unable to appreciate the argument. I do not know what Acts "like Municipal Corporation Acts" are; and, consequently, I cannot understand what it is that is similar to a Municipal Corporation Act that is not a Corporation Act. As the Municipal Corporation Acts include all the Acts which are Corporation Acts, I must read "otherwise" according to its proper meaning, and the words "otherwise independently of this Act" to mean that all the rights, powers, and authorities which the corporation had independently of this Act were preserved to them.

Now this local Act received the Royal Assent on the 5th of July, 1865, and consequently preserved to the corporation, as I read it, any rights or powers they then had and not repealed by this Act. It now turns out that a general Act had been passed only a few days before, having received the Royal Assent on the 29th of June, 1865. So that on the 5th of July this other general Act was in force, and if I am to read the 366th section of the local Act, as I do read it, to be general, then the corporation had the power under the public Act to make the sewer under this street. That there can be no question about, in my opinion, because the sewer authorities (a term which included this corporation) were, under the 4th section of the public Act, to have power to construct such sewers as they might think necessary for keeping their district properly cleansed and drained; and, as respects all sewers constructed by them, to have all the powers that local boards had in respect of sewers under the 45th section of the *Public Health Act*, 1848, the powers of which are similar for this purpose to the powers of the *Public Health Act*, 1875; there is no substantial difference. The result, therefore, is, that under this public Act of 1865 they had the powers vested in them for constructing a sewer under the street, which were vested in authorities of this kind by the other public Act of 1848.

These two Acts were repealed by what is called a consolidation Act, that is, they were repealed for the purpose of having their provisions consolidated into one Act. For the purpose for which I am now dealing with the *Public Health Act*, 1875, I take the *Public Health Act* of 1848 to have been substantially copied,

because there is no appreciable variation, and in considering the effect of the Act of 1875 on the local Act, I must really treat the *Public Health Act*, 1875, as a mere continuation of the powers of the *Sewage Utilization Act* of 1865, not that it is really so in form, but that it is so in effect. In other words, if the intention of the Legislature in passing the local Act was to preserve the general powers under the *Sewage Utilization Act*—which I am bound to rule it was, whatever my own opinion, not being judicial, may be upon the subject—then I am of opinion that the rule which says that ordinary general legislation does not override special legislation, has no application to the case before me. General legislation was expressly reserved by the local Act, and the consolidated Act, being a mere continuation of that general legislation, is not in substance a new power conferred on the corporation, but simply a continuation of their old powers. It is in no way interfered with by the provisions of the local Act.

Now that brings me to the next point, namely, what is the power?

If the power is contained anywhere, it is contained in the 16th section of the *Public Health Act*, 1875: "Any local authority may carry any sewer through, across, or under any turnpike road, or any street or place laid out as or intended for a street." The question I have to consider is this—Is the place in question "a street or a place laid out as or intended for a street?" In considering that I must also take into account the interpretation clause of this Act of Parliament, which says that a "'street' includes any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." I must also take into consideration that the Act expressly calls places "streets," whether they are public property or private property, and whether the public have any rights over them or have no rights over them. There is a series of sections, beginning with the 150th, the marginal note of which explains what I mean: "Power to compel paving, &c., of private streets." The word "streets" in this Act of Parliament clearly extends to places which are in all respects private, and over which the public have no right. If it is anything, therefore, this is a private street. Now what is it? It is a strip of land which seems to have been sold to the Plaintiffs for the purpose of being made

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or turned into a road. Houses were built on each side of this private road; these houses now exist; they have been and are now occupied, and are within the borough of *Oldham*.

The question I have now to consider is, Is this a street or not? I have no doubt it is a street. I was told that it could not be a street at all unless the owners of the houses had a right of way along it. In this particular instance there is no evidence at all as to whether they have or have not a right of way, but it is not denied that they do exercise such a right of way, and do pass and repass; and therefore I should presume, in the absence of express evidence to the contrary, that they have some right of way. If it is necessary—which I do not think it is—I shall assume, for the purpose of this motion, that the owners of these houses have some sort of right of way over the road. The definition of a street is thus laid down in the Imperial Dictionary: "A street is properly a paved way or road; but in usage, any way or road in a city, having houses on one or both sides." Now, tried by that test, this is a street: it has houses on both sides of it, and therefore, in common parlance, it is a street. It is really a street. Supposing that were wrong, I find "street" is to include "road," and this certainly is a road. But, further than that, the 16th section of the Public Act of 1875 applies to "any place laid out as or intended for a street." This is laid out as a street, and is undistinguishable from any other street, so that in every way that you can define it, it appears to me to be within that section. The learned counsel for the Plaintiffs pressed upon me that I must have some regard to common sense in the meaning of the section. I by no means wish it to be thought that I disregard it. It would be monstrously absurd to interpret the Act in any other way. What is the Act for? It is a public health Act. The owners of these private courts and alleys are, of all people in the world, the most averse to laying out money in sanitary works. It is in these places that the poor live, the very people who suffer most from the want of sewerage and drainage, which are so requisite for public health. Is it to be imagined that the Legislature intended to except such places as these from the operation of the Act? I should say, if the Act were passed for anybody, it must have been meant to include those owners, who, for the

sake of gain and acquiring high rents in proportion to the annual value of the wretched tenements they allow the poor to occupy, neglect ordinary and necessary sanitary precautions. If I were to interpret it by what I might think to be the mind of the Legislature, I should suppose that the first people to be included would be the owners of these crowded courts and alleys, over which the public have no strict rights whatever, but which are intended to be used for the dwellings of the poor, and are unprovided with what, according to modern science, is known to be absolutely necessary for their well-being.

Looking at the Act in that way, common sense is entirely in accordance with what I conceive to be its true legal meaning. That being so, in my opinion, this is a street within the meaning of the Act, and the Defendants have power to make the sewer under it without any further notice whatever.

Now, it must not be omitted to be mentioned, that if corporations do take private property under these Acts, they must make compensation; consequently no injury is done to any one by their exercising these powers. They give health to the inhabitants, and they pay for the property which they take for a purpose which common sense would dictate. It is on the same principle that, when roads and canals and other public works are to be executed, there are powers given to take private property for those purposes, on due compensation being made. That gets rid of the argument on the *Public Health Act*, 1875.

Now, with regard to the local Act itself (and this may have a bearing hereafter on the question of costs), I must say that I think the corporation were entirely mistaken in the course they pursued, because, as I read the 27th section (which, I may observe, expressly calls this place a "road or street"), it seems to me that, as regards this particular road, the corporation made a bargain in that section which they did not intend to repudiate by giving notice under the 16th section. The corporation, by the 27th section, obtained the power to purchase compulsorily the private rights over this road. They were to exercise that power within five years, and when they completed the purchase then the road was to be subject to the provisions relating to sewering, &c., which affect streets not being highways. When we come to look at the

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16th section, which is the section containing those provisions, it obviously applies to a private street—a street "not being a highway;" and consequently, according to all ordinary rules of interpretation, where you find this particular power is to be subject to those provisions on the completion of the purchase, you must import into it a negative, that is, that until completion it is not to be so subject.

On that ground I have no hesitation in saying that the advisers of the corporation were mistaken, and their counsel virtually gave up that point.

Then there is another point of much more difficulty, on which I have heard a great deal of argument, as to whether, notwithstanding the 3rd sub-section of sect. 27 of the local Act, the corporation might proceed under another section of the same Act of Parliament—the 60th. No doubt it is not very easy to reconcile all the clauses in this Act, and I am very far from saying that there is not a great deal to be said in favour of that view, but I think in all these Acts of Parliament the first thing you have to consider is, that where you have general provisions, whether contained in the same Act or in another Act of Parliament, and where you have special provisions as to a particular property in the ownership of one individual, you must read the special provisions as excepted out of the general. That is the only way of reconciling these Acts of Parliament. It is the practice of Parliament, as those who are in the habit of going before Parliamentary Committees know, to insert in the bill the special clauses which are agreed on, and then those persons who have obtained their insertion leave the committee-room, and have nothing further to do with the bill. The Committee would not listen to them on the general clauses. They would only say, "It is no business of yours; you have been provided for, and you have had all your clauses put in." If you once admit the doctrine that the general provisions are to override the special ones, anybody getting a clause inserted in the bill ought to be heard on every clause of that Act. It would be simply impossible to conduct private legislation at all if any such doctrine were admitted or prevailed. I consider it to be the established rule, that when you find general provisions of this sort, either in the same Act or other Acts, they

are not to control or repeal the special provisions, which are considered to provide for the particular property. I should, therefore, on that ground, not be disposed to hold that the 60th section was intended to override the 27th. The 60th section enables the corporation to make, from time to time, the sewers which are necessary for the effectual drainage of the borough, and they may make them "under the streets"—that is general. That cannot, properly speaking, affect the 16th section, because the reading of that section is, that where it is a private street the corporation is not to make the sewer, that is, not at the public expense. The owners of the houses are to make the sewer; and it is only on their refusal that the corporation is to make it. Then what is to happen? The owners of the houses are to pay for it. The corporation have no right to throw the burden of making the new sewers in these private streets on the whole of the town, which they would do if the 60th section was intended to apply. But it does not apply, because it is a general provision, and you must except out of it the special provision, on the principles which I have mentioned. Then it goes further, because the 59th section makes the corporation owners of the sewers when once made. The words are, "All existing and future public sewers and drains within the borough, and all existing and future sewers and drains," and so forth, are to "vest in the corporation," whether made or provided at the cost of the corporation or otherwise.

Now, that is a very useful provision. It was found under the old law, and it was sometimes held, that the sewer authorities (they were not called sewer authorities in those days) had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement or right of sewerage or drainage, the absolute property in the sewer (which means not merely the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities. And if the sewer is a large one, it amounts, in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation.

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That being so, what would follow if I were to allow the 60th section to apply? They would make the sewer under the private street and then become the owners, for all substantial purposes, of the subsoil, of course making compensation to the owner. But I find that the 5th sub-section of sect. 27 is this: "Nothing in this Act shall empower the corporation to purchase or take by compulsion any estate or interest in the soil of the said road or street." If I am right as to the meaning of the 59th and 60th sections, and they are proceeding under the latter section, they do acquire it by compulsion, making compensation for the interest in the soil of the road or street. Why should I depart from the literal meaning of the words, when I find that they exactly accord with what I should describe as the common sense of the arrangement, namely, that the corporation shall not make a sewer under this street, and not interfere with it at all unless they pay for it? That is the meaning of the arrangement between the parties, and that is the literal meaning of the Act. The words are, "Nothing in this Act shall empower," not, "Nothing in this section." I asked the learned counsel who argued the case so strenuously for the corporation, what other possible meaning there could be to the clause. His answer, which was more ingenious than successful, was that it was a saving clause, and that he did not feel bound to put any meaning on it at all, and that a saving clause does not necessarily import that the thing that it is saving was included in any of the other provisions. That, at all events, is not a satisfactory answer when you find another enactment that does expressly affect the property in question. It has sometimes been said, that in the absence of an express provision you must not import a provision into the Act affecting the subject-matter to which the saving clause applies. If there were no express provision here, it might be said this was a saving clause put in *ex abundanti cautelâ;* but when you have a saving clause, and you find another enactment which does directly affect the subject-matter of the saving clause, then I think the natural and proper construction is to say that the saving clause was intended to be an exception out of the Act, and not that it was put in *ex abundanti cautelâ*, it being really wanted for the express purpose, which, by its very terms, it effects.

I think, therefore, if this case rested on the local Act alone, I should have been in favour of the Plaintiffs; but as it is, and for the reasons I have given, I am in favour of the Defendants, and, therefore, I refuse the motion, making the costs costs in the cause.

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Solicitors for Plaintiffs: *Clarke, Woodcock, & Ryland,* agents for *Tweedale, Son, & Lees, Oldham.*

Solicitors for Defendants: *Chester, Urquhart, & Co.,* agents for *Booth, Manchester.*

CLOWES *v.* HILLIARD.

M. R. 1876 Dec. 4.

[1876 C. 206.]

Administration Action by possible designated Next of Kin—Unascertained Class—Contingent Interest—Right of Action—Adding Parties—Rules of Court, 1875, *Order* XVI., *r.* 2.

Bequest on the death of testator's daughters without issue to the persons who would be entitled under the statute if testator had then died intestate. Administration action brought in the lifetime of the daughters, and before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue:—

Held, on demurrer, that the Plaintiffs had only an expectation and not an interest, and were not entitled to maintain the action.

Roberts v. *Roberts* (1) considered.

A Plaintiff can only be added under Rules of Court, 1875, Order XVI., rule 2, where there has been a *bonâ fide* mistake.

Statement.

CHARLES CLOWES, by his will, dated the 16th of November, 1857, bequeathed his residuary personal estate to trustees upon trust to pay the income of £4000, part thereof, to his daughter *Frances* during her life, and directed that upon her death the said sum should fall into the residue. And subject thereto, the testator declared that his residuary personal estate should be held upon the trusts therein mentioned for the benefit of his daughters *Isabella, Helen,* and *Emily,* and their respective issue, in equal shares, with cross remainders between them, the issue to take vested interests at twenty-one or marriage. And the testator

(1) 2 Ph. 534.

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declared that "if all my said daughters *Isabella*, *Helen*, and *Emily* shall die without having any child, children, or issue who under the trusts aforesaid shall acquire a vested interest in the premises, then I direct that my trustees shall stand possessed of the residue of my said personal estate, and the stocks, funds, and securities on which the same shall be from time to time invested, in trust for such person or persons as would have been entitled to the residue of my trust estate under and according to the Statutes of Distribution in case I had then died intestate."

The testator died on the 4th of June, 1869, leaving his four daughters surviving him.

This was an action for the administration of the testator's personal estate, the Plaintiffs being two of the nephews and a niece of the testator, who would, as some of his next of kin, be entitled to part of his residuary personal estate if his four daughters, who were all living and unmarried, were now dead without issue.

None of the daughters were parties to the action, and it appeared to have been instituted against their wishes.

The testator's daughter *Frances* was a person of unsound mind. One of the other daughters was, it was said, about to be married.

The Defendant, the surviving trustee and executor of the will, demurred to the Plaintiffs' statement of claim on the ground that they had no such interest as entitled them to institute the action.

Argument.

Ince, Q.C., and *E. Ward*, for the demurrer:—

The Plaintiffs claim as members of a class which cannot at present be ascertained, being ascertainable only on the happening of a future contingent event. They have, therefore, no present interest, but merely the expectation of a future interest, which is not sufficient to entitle them to maintain an action.

[They were stopped by the Court.]

Chitty, Q.C., and *T. L. Wilkinson*, for the Plaintiffs:—

We have a present interest, contingent on the daughters dying without issue, and though it may not be a valuable interest, still it is one which the law recognises: *Roberts* v. *Roberts* (1). In

(1) 2 Ph. 534.

Davis v. *Angel* (1), Lord *Westbury* says (2): "An existing interest, whether it be vested or contingent, however future or remote, may, if it be a present interest, form the foundation of a right in the party representing it to come here with a bill to have the share secured." We submit, therefore, that our interest is such as to enable us to maintain this action. If, however, your Lordship should be of a contrary opinion, then we ask, under Rules of Court, 1875, Order XVI., rule 2, for an order adding the testator's daughter *Frances* as Plaintiff.

[JESSEL, M.R.:—That rule only applies where the action has been "commenced through a *bonâ fide* mistake." It does not apply to such a case as this.]

JESSEL, M.R.:— Judgment.

I am of opinion that the Plaintiffs are not entitled to maintain this suit.

The question I have to decide is whether members of an unascertained future contingent class are proper parties to institute an action.

I should have thought the question had been the subject of decision over and over again; but, however, I cannot find that the exact point has been decided in any reported case. The time has passed in which every person interested in the subject-matter of a suit had to be made a party to it, for no rule is better established than that a contingent class need not be represented in a suit. The question is whether they may or may not be Plaintiffs. Now, we are familiar with the doctrine that a person having an existing interest, however future or remote, may, so long as it is a present interest, institute a suit; but can a person having the mere expectation of a future interest institute a suit? In the analogous case of a vested remainder in tail in real estate, it was always the rule that the person entitled in remainder after the estate tail could not institute a suit. Now in this case the gift is to those persons who may answer the description of the testator's next of kin at the period when all his four daughters shall have died, and, as to three of them, without issue who shall have acquired vested

(1) 4 D. F. & J. 524. (2) 4 D. F. & J. 529.

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interests. That is, it is a gift to a future contingent class of persons. It is as if the testator had said, "I give to those persons who, if I continue to live up to a certain period, would at that period be my next of kin." Therefore these Plaintiffs, who claim to be some of the testator's possible next of kin, are in the same position as persons claiming to be next of kin of a living person. *Ex hypothesi* the testator is to live on. Whether, therefore, you attempt to ascertain the next of kin of a living person or of a person dying at a future period, it is the same thing; there is no difference. You cannot predicate of any one that he will be a member of the class. It is, therefore, an unascertainable future contingent class, a class to be ascertained on a future event; *ergo*, it cannot be ascertained now. If the testator's next of kin are to be ascertained now, then the daughters are sole next of kin and the only persons entitled to sue as such. Who are the persons instituting this action? They are collateral relations—nephews and a niece of the testator, and persons who would now be some of his next of kin only if the daughters and their issue were out of the way. One of the daughters is about to be married, and probably she may have children. How can the Plaintiffs affirm that, on the failure of the daughters and their issue, if the event ever happens, they or any of them will be then alive? They may all then be dead. They have, in fact, neither a present interest nor anything beyond the expectation of a future interest. They have no interest at all, either vested or contingent; and it is a rule of this Court that to enable them to sue they must have either the one or the other. Two cases have been referred to, one of which, *Roberts* v. *Roberts* (1), was a case of great singularity. Now, speaking with all deference to Lord *Cottenham*, who decided that case, there are portions of his judgment I am unable to follow. The testator gave his residuary personal estate to his three daughters, who were his only children, with an ultimate trust, "in the event of their all dying under twenty-one, and without having been married, for those who would then be entitled under the Statutes of Distribution." The testator's widow was joined as co-Plaintiff in a suit for the administration of the estate, and a general demurrer was put in on the ground of misjoinder, it being

(1) 2 Ph. 534.

contended that the widow had not such an interest as entitled her to be a party. It was held that she was a proper party, but for a reason I cannot understand. If it had been said that she was at present actually entitled to a portion of the residuary personal estate, I could have understood the decision. She had no doubt an interest as well as the next of kin at the testator's death, but subject to its being defeated. But that was not the ground of the decision. The ground upon which I feel a difficulty is this, that Lord *Cottenham* makes a distinction between the widow and the next of kin. He says (1): "There is a great difference between the widow and the next of kin. The next of kin are unascertained. The widow is no part of a class, but entitled in her own individual right; if she dies she loses her right." Now the gift was to a class to be ascertained at a future time, and the widow was not at present a member of that class; she might have been if she had lived so long; so might the testator's present next of kin if they had lived so long. It seems to me, therefore, that the distinction which Lord *Cottenham* made was not a sufficient answer to the question. He says in his judgment (2): "Now, even assuming the Appellant's construction of the will to be correct, the widow is already contingently entitled to a share of the testator's estate in the event of her surviving her children, and their all dying under twenty-one and unmarried. Nothing can prevent her taking a share, but her dying before the period arrives at which the interest of the daughters ceases. She is no part of a class, but has a separate and individual right to a portion of her husband's property not disposed of." Now, if Lord *Cottenham* means that as the widow takes a share now, and therefore will be entitled even if the contingent class fails, I can understand his decision. It is clear that he makes a distinction between the members of the class and the widow, but, with great deference, I see no such distinction. The gift is to a class of persons of whom the widow may or may not be one. How can that be such an interest as to enable her to maintain a suit? So far as the decision goes, it is not favourable to the Plaintiffs, for Lord *Cottenham* seems to have considered that the testator's sister, who was one of his possible

(1) 2 Ph. 535. (2) 2 Ph. 536.

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future next of kin, had not such an interest as to enable her to be a Plaintiff, although the widow had.

In the other case which was referred to, *Davis* v. *Angel* (1), before Lord *Westbury*, the gift in effect was this: It was a gift to the testator's nephew for life, with remainder to his eldest or only child, subject to a condition precedent that the nephew should marry a specified niece of the testator. The nephew, in the testator's lifetime, married some one else, and he, his wife, and a son were living at the testator's death. It was held that the possibility of the nephew's wife predeceasing him and his marrying the niece did not confer upon the nephew's son an interest sufficient to enable him to maintain a bill. Lord *Westbury* says (2): "He has no interest whatever at present. He has, as I have already said, an expectation of the possibility of a future event, which, if it occurs, may give birth to an interest." The decision is clear that nothing less than an interest will allow a man to maintain a suit. Therefore, looking at it as an authority binding on me, it is a decision in favour of the demurring party and against the Plaintiffs. Proceeding, then, upon the sound principle that a person who may not be a member of a class which is to be ascertained, and which is to take upon the happening of a future contingent event, is not a person who can maintain an action, I am of opinion that the Plaintiffs had no right to institute this action, and the demurrer must therefore be allowed.

Solicitors for Plaintiffs: *Allin & Greenop.*
Solicitors for Defendant: *Talbot & Tasker.*

(1) 4 D. F. & J. 524. (2) 4 D. F. & J. 531.

LEYLAND *v.* STEWART.

M. R.
1876
Dec. 5.

[1876 L. 36.]

Copyright—Parol Assignment—Assignment in Writing—5 & 6 *Vict. c.* 45.

An assignment of a copyright under 5 & 6 Vict. c. 45, must be in writing. Accordingly, where the author of a song agreed verbally with *S.* to part with his copyright, and subsequently by instrument in writing assigned it to *L.*, who entered the song at *Stationers' Hall*:—

Held, that the title of *L.* must prevail, and that he could sustain an action to restrain *S.* from infringing his copyright.

Statement.

THIS was an action by the Plaintiff, a music publisher, to restrain an alleged infringement by the Defendant, also a music publisher, of the Plaintiff's copyright in the words and music of a song called *Mignonette*.

The song was in the year 1868 published by the Defendant under a verbal agreement with the author, *Suchet Champion*, but no instrument of assignment of the copyright was executed by him to the Defendant.

By an instrument in writing dated the 25th of March, 1874, *Champion* assigned to the Plaintiff the entire copyright of the words and music of the said song, in consideration of a royalty on each of the copies sold.

On the 2nd of July, 1874, the Plaintiff, as proprietor of the copyright of the song, made entry in the registry book of the *Stationers' Company* of the title of the song, and of the several other particulars required by the Act 5 & 6 Vict. c. 45, and notice of the assignment was given to the Defendant.

The Defendant, after the said dates of assignment and registration, continued to publish and sell many copies of the said song, and the Plaintiff now claimed damages for the infringement of his alleged copyright, an account of profits made by the Defendant, and an injunction to restrain the publication and sale of the said song.

Argument.

Ince, Q.C., and *Byrne*, for the Plaintiff.

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Argument.

Chitty, Q.C. (*Kekewich* with him), for the Defendant:—

The Defendant had a prior title to the copyright under the verbal assignment in 1868, for an assignment is not required to be in writing under 5 & 6 Vict. c. 45. In *Wood* v. *Boosey* (1) *Cockburn*, C.J., observed: "The moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any mode by which property of that description can be assigned in law."

Judgment.

JESSEL, M.R.:—

I am of opinion that the Plaintiff is right in law. The case is a simple one, and appears to me to be concluded by authority, for though no judicial interpretation appears to have been put on the 13th section of the Act 5 & 6 Vict. c. 45, yet all the decisions as to assignments of copyright being in writing under the Act of 8 Anne, c. 19, apply to the later statute.

Under the old Act it was established by a series of decisions that, as the consent in writing of the proprietor was required to the printing of any book by any person, the assignment, which was a greater thing, must be in writing also: *Power* v. *Walker* (2). The provisions of the old Act as to "consent in writing" are re-enacted by sect. 15 of 5 & 6 Vict. c. 45. So, upon the principle of those decisions, an assignment of a copyright now, unless made by entry in the registry at *Stationers' Hall*, must be in writing, and an assignment not in writing is not sufficient. Therefore in this case, the Defendant, claiming as he does under a parol assignment, cannot prevail against the Plaintiff's title.

Solicitor for Plaintiff: *R. G. Marsden.*
Solicitor for Defendant: *James Mason.*

(1) Law Rep. 2 Q. B. 340, 351.

(2) 3 M. & S. 7.

CROSSLEY *v.* CITY OF GLASGOW LIFE ASSURANCE COMPANY.

M. R.
1876
Dec. 9.

[1876 C. 144.]

Life Policy—Deposit to secure Debt—Equitable Assignment—Death of Assured—Notice to Office of Creditor's Claim—Absence of Legal Personal Representative of Assured—Payment to Creditor—Interest—Policies of Assurance Act, 1867 (30 & 31 *Vict.* c. 144)—*Chancery Amendment Act*, 1852 (15 & 16 *Vict.* c. 86), *s.* 44.

S. having effected two policies on his life for the purpose, as he expressly informed the assurance company, of enabling him to give *C.* a security for a debt which exceeded the amount of the policies, deposited them with *C.*, at the same time asking him by letter to instruct his, *C.'s*, solicitor "to prepare the necessary assignment." *C.*, however, never took any assignment. *S.* died insolvent, having made a will appointing executors, but no representation was taken out to his estate. *C.* then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the *Policies of Assurance Act*, 1867, s. 6. Proper evidence of *S.'s* death having been subsequently produced to the company, they wrote to *C.* that the claim under the policies would be paid at the expiration of three months, but that the assent of *S.'s* legal personal representative would be required before settlement.

After the expiration of the three months *C.*, being unable to obtain payment of the policy moneys (although his debt was admitted by *S.'s* executors, and he offered the company an indemnity), brought an action for that purpose against the company, insisting that *S.'s* deposit and letter constituted an equitable assignment of the policies within the *Policies of Assurance Act*, 1867, and therefore enabled him to give a valid discharge for the moneys:—

Held, that there had been no equitable assignment of the policies within the Act, and that the company were justified in refusing to pay him in the absence of *S.'s* legal personal representative:

Ordered, payment of the policy moneys to the Plaintiff after deducting the company's costs, the legal personal representative being dispensed with under the power given to the Court by sect. 44 of the *Chancery Amendment Act*, 1852 (15 & 16 Vict. c. 86): also payment by the company of interest at 4 per cent. from the day which had been fixed by them for the payment of the principal.

Wolfe v. *Findlay* (1) disapproved of.

Statement.

IN the year 1867, the Plaintiff, *John Crossley*, Esq., M.P., lent *Julius Sichel* and his brother, *Emil Sichel*, who were partners in

(1) 6 Hare, 66.

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trade, the sum of £5000 without security. In the year 1870, the Plaintiff pressed *Julius Sichel* for a security, and it was ultimately arranged that *Julius Sichel* should insure his life and assign or deposit the policies to or with the Plaintiff. Accordingly, on the 10th of October, 1870, *Julius Sichel* effected two policies on his life in the Defendants' office for £1500 and £1000 respectively, the moneys being made payable on the death of the assured to his "heirs, executors, administrators, or assigns" in the usual form. On the 12th of October, 1870, *Julius Sichel* informed the Defendants by letter that the policies had been taken out as a security for the Plaintiff's benefit.

On the 21st of October, 1870, *Julius Sichel* forwarded the policies to the Plaintiff accompanied by the following letter:—

"My dear Sir,—By this post, registered, I send you as promised two policies on my life. My brother *Emil* intends paying the half-yearly premiums on the one for £1500, and I will (D.V.) pay the quarterly premiums on the smaller one of £1000. Kindly instruct your solicitor to prepare the necessary assignment to your good self. Most faithfully yours,

"*Julius Sichel.*"

Through some oversight, however, on the part of the Plaintiff, no further or other security was ever prepared or executed, but he retained the policies in his possession, the premiums being paid as proposed in the above letter.

On the 15th of October, 1874, *Julius Sichel* died, having made a will appointing executors, but as he died insolvent the will was never proved, and in fact no one had taken out administration to his estate.

On the 14th of September, 1875, the Plaintiff's solicitor wrote the Defendants a letter giving them notice of the death of *Julius Sichel*, and also that his client "held the two policies as security for certain advances made by him to the deceased largely exceeding the amount of the policies."

This notice was acknowledged by the Defendants by a receipt in the terms of sect. 6 of the *Policies of Assurance Act*, 1867, and signed by their secretary, for which the Plaintiff paid the statutory fee of 5*s.*

The Plaintiff subsequently forwarded to the Defendants a certificate of *J. Sichel's* death, and on the following day, the 7th of October, 1875, their secretary wrote to the Plaintiff informing him that the claim under the policies would be paid on the expiration of three months from that date, but that probate of the will or letters of administration would be required before settlement.

At the expiration of the three months the Plaintiff applied to the Defendants for payment, informing them that *Sichel's* executors admitted his debt, but they still insisted that in the absence of any deed of assignment of the policies, probate or letters of administration must first be produced, and the assent of *Sichel's* properly constituted legal personal representative obtained. Some correspondence then passed between the Plaintiff's solicitor and the Defendants' manager, in the course of which the former admitted that "the difficulty was that there never had been any assignment of the policies" to the Plaintiff, and offered the Defendants an indemnity and an undertaking to produce probate or letters of administration whenever obtained, but the offer was refused.

On the 5th of April, 1876, the Plaintiff's solicitor made a formal written application to the Defendants for immediate payment of the amounts due on the policies, at the same time enclosing copies of *Sichel's* letter of the 21st of October, 1870, and of certain letters written by his executors, in which they admitted the Plaintiff's debt and offered to render him every assistance in their power to enable him to recover the moneys, short of proving the will, which, having regard to the state of their testator's affairs, they declined to do.

The Defendants nevertheless still refused to pay the Plaintiff, and accordingly, on the 22nd of April, 1876, he brought this action against the Defendants, claiming a declaration that the policies had been assigned to him for valuable consideration, and that he was beneficially entitled thereto, and to the moneys payable thereunder, and an order for payment accordingly, together with interest from the 7th of January, 1876, the date fixed for payment of the moneys by the Defendants' letter of the 7th of October, 1875: there was no claim for costs.

The Plaintiff's evidence in support of his claim consisted of the whole of the correspondence.

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The Defendants, in their statement of defence, submitted that the Plaintiff was unable to give them a valid discharge or receipt for the policy moneys, and declined to admit the Plaintiff's statement of the dealings between himself and *Sichel*, as they knew nothing of the state of accounts between them. They further submitted that there had been no legal or absolute assignment of the policies to the Plaintiff within the *Policies of Assurance Act*, 1867, or otherwise, which could enable him to sue them in his own name, and that *Sichel's* legal personal representative was a necessary party to the action. They also expressed their willingness to act under the direction of the Court as to the payment of the moneys.

The action now came on for hearing.

Argument.

Chitty, Q.C., and *W. W. Cooper*, for the Plaintiff:—

We submit that the letter of the 21st of October, 1870, coupled with the deposit of the policies with the Plaintiff, operated as an equitable assignment within the *Policies of Assurance Act*, 1867, and enabled him to give a valid discharge for the moneys. In fact, the Defendants, in acknowledging the notice of the 14th of September, 1875, as required by the Act of 1867, accepted it as notice of an assignment, and we paid them for their receipt upon that footing. But no assignment was really necessary, the mere delivery of the policies to the Plaintiff being sufficient: *Rummens* v. *Hare* (1). Moreover, the nature of the transaction between the Plaintiff and the assured—of which the company had express notice at the time the policies were effected—necessarily implied a power to give receipts, for in such a case, as Lord *Cranworth* said in *Desborough* v. *Harris* (2), it is impossible for the insurance company to go into the equitable rights between the mortgagor and mortgagee, depending as they must on the state of the accounts, which are beyond the control of the persons bound to pay. *Brasier* v. *Hudson* (3), which was cited in that case, and where it was held that the first mortgagee of a fund could not alone give a receipt for the money, but that all other subsequent claimants must also concur, is disapproved of by Lord *St. Leonards*: *Sugden's*

(1) 1 Ex. D. 169.
(2) 5 D. M. & G. 439, 458, 459.
(3) 9 Sim. 1.

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Vendors and Purchasers (1). It is unnecessary to take out administration in this case to the estate of the assured, as the money is payable to us as his "assigns" under the terms of the policies. Administration is only necessary where the money is payable to the executors or administrators. But the Court may proceed in the absence of the legal personal representative: *Chancery Procedure Act*, 1852 (15 & 16 Vict. c. 86), s. 44. We submit that the Defendants might have been satisfied with the Plaintiff's offer of an indemnity; or they might have paid the money on a statutory declaration of his title, which is fully proved by the correspondence. It was unnecessary to compel us to bring an action.

Argument.

Davey, Q.C., and *Farwell*, for the Defendants, were not called upon.

JESSEL, M.R.:—

Judgment.

The only question is, whether the insurance company were fairly warranted in refusing to pay the amount of these policies without a proper receipt. I am of opinion they were, and that they would have been acting very imprudently in paying it without. Of course the insurance company were perfectly at liberty, if they thought fit, to accept the indemnity of the Plaintiff, but they did not so think fit.

The case is an exceedingly simple one. The first point is this. It is said that the letter of the 21st of October, 1870, coupled with the deposit of the policies, constitutes an equitable assignment under the Act. I think it does not. The letter is exactly what it purports to be. The Plaintiff was to instruct his solicitor to prepare an assignment of the policies. No consideration was stated, and there was no agreement to assign. There had been a deposit, and there was to be an assignment only if the Plaintiff thought fit. For some reason or other he did not choose to take an assignment, but was content to rely on the deposit. Then, after the death of the assured, he gave notice to the office, on the 14th of September, 1875, through his solicitor, that he held the two policies as security for certain advances, and the company

(1) 14th Ed. p. 665.

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gave a receipt for the notice in the terms of the *Policies of Assurance Act*, 1867.

It was gravely argued before me that there was an assignment by virtue of this notice; that inasmuch as the company took 5*s.* for acknowledging the notice under the Act, they ought not to have taken the 5*s.* unless the notice had been notice of an assignment. But it has been expressly admitted by the Plaintiff's solicitors that there was no assignment, and yet the Plaintiff now says that that notice made an assignment. Of course it did not. That is a case in which the argument need only be stated to see that it is not well founded. That was the second point. Then the third point was this: the man is dead; nobody proved his will; he has no executor, and no legal personal representative; but the Plaintiff says to the company, "I am a depositee for value, I have given you notice of my security, and it entitles me to give a good receipt." In the first place, the question as to whether the debt is due or not is just the very question which the company want decided. How are they to find out whether the security is or is not a valid one? It is said they might have taken a statutory declaration. I know of no law which says that the company shall take a statutory declaration. The company were entitled to a legal discharge, which they have not obtained.

The case comes to this: A man in possession of a piece of paper, say a policy of insurance, goes, after the assured is dead, to the insurance office and says, "This was deposited with me as security for a debt; it is true I have no writing to shew even that, for it was only a verbal deposit, but a good deal of money is due to me on the security, and I insist upon your paying me, on my receipt, without any communication with the executor of the debtor, because there is none, and without any proof beyond my assertion, either by solemn declaration or otherwise, that the money is due to me." Then he finds fault with the insurance company, who are men of business, because they say that is not satisfactory and they are not willing to pay, the whole difficulty having been occasioned by his own carelessness in not taking an assignment. Then he comes here and brings an action, which he was quite entitled to bring, and there I think I can help him,

because, under the power conferred on me by the Legislature, and under the circumstances of the case, seeing that it is sufficiently proved that the money is really due, I can do without the legal personal representative. The 44th section of the Act, 15 & 16 Vict. c. 86, which confers that power, is undoubtedly still in force, for although it is not incorporated by express provision in the new Judicature Rules, yet it is saved by the note at the commencement of the rules, and I have acted upon it recently. I shall, therefore, declare that, it appearing that this is a case in which the presence of the legal personal representative may be dispensed with, the suit may proceed in the absence of the legal personal representative. There will, therefore, be judgment for payment by the company to the Plaintiff of the amount due; and as the company ought certainly to be indemnified against all the costs of the action, which have been occasioned entirely through the Plaintiff's negligence, I shall give them their costs, to be deducted out of the amount.

Judgment.

On the question of interest,

Chitty submitted, that inasmuch as by virtue of the Defendant's letter of the 7th of October, 1875, the principal was payable on a day certain, the Plaintiff was entitled to interest at 4 per cent. from that day.

Argument.

Farwell:—Until now, the Plaintiff has not been able to give us a legal discharge for the money. It does not necessarily follow that because money due on a policy of assurance is to be paid on a day certain, interest is chargeable in default of payment on that day. A Court of Equity will not allow interest where there has been no legal hand to receive the money: *Wolfe* v. *Findlay* (1).

JESSEL, M.R.:—In that case the money was not payable at a day certain. The case was simply this. A firm in *India* collecting the estate of a dead man under a power of attorney from the administratrix, knowing it was trust money, transmitted it to their agents in *London* with notice of the trust. The agents kept the money for ten years, and mixed it with their own moneys, and

Judgment.

(1) 6 Hare, 66.

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it was held that they were not liable to pay interest, merely because no application had been made during the ten years for payment of the money into Court. With the greatest possible deference to Vice-Chancellor *Wigram*, who decided that case, I should have decided the contrary on the very plainest principles of equity. The agents were admittedly trustees of the money, and they might have invested it in consols at any time. I should never have allowed them to keep it for ten years and mix it with their own moneys. I recollect that the late Master of the Rolls, in a similar case, of *Barlee* v. *Murietta*, declined to follow *Wolfe* v. *Findlay* (1). It is clear that these Defendants must pay interest at 4 per cent. from the 7th of January, 1876, the day on which the money was payable.

Solicitor for Plaintiff: *H. Philbrick.*
Solicitor for Defendants: *G. Debenham.*

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MARTIN *v.* GALE.

[1876 M. 238.]

Infancy—Voidable Deed—Assignment to secure Money advanced for Necessaries.

A deed by an infant to secure the repayment of money advanced for necessaries is voidable.

Where the Plaintiff had advanced money to an infant partly in order to pay for necessaries, and he had by deed assigned to the Plaintiff his reversionary interest as a security,—in an action brought against the infant on his attaining twenty-one, for an account of moneys advanced to him and expended on necessaries, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest:—

Held, that, though the Plaintiff was entitled to an account and an order for repayment, the deed was not binding on the infant, and the security could not be enforced.

Statement.

THIS was a motion on the admissions in the statement of defence under Rules of Court, 1875, Order XL., rule 11.

By an indenture, dated the 9th of June, 1875, and made between Mrs. *Gale*, the mother of the Defendant, *William Charles*

(1) 6 Hare, 66.

Gale, of the first part, the said Defendant of the second part, and the Plaintiff of the third part, after reciting that the Defendant had not then attained the age of twenty-one years, and that Mrs. *Gale* had applied to the Plaintiff to advance her £150 for the purpose of enabling the Defendant to get clothes and other necessaries, and that she had proposed to become security for the repayment thereof, it was witnessed that in consideration of the sum of £150 then advanced, Mrs. *Gale* and the Defendant jointly and severally covenanted with the Plaintiff for payment to him of the said sum and £10 per cent. interest, and the said Mrs. *Gale* as to her life interest, and the Defendant as to his reversionary interest, assigned to the Plaintiff certain sums of stock therein mentioned as a security for the repayment of the said sum and interest.

The Defendant having attained the age of twenty-one, the Plaintiff brought this action, alleging the before-stated indenture, and also alleging that the said sum was advanced to enable the Defendant to pay debts which he had incurred for necessaries, and also to buy other necessaries, and upon his representation that he would expend the same upon necessaries for himself, and alleging that the same was so expended.

The Defendant by his statement of defence denied that he had received more than £95 of the said sum of £150, but admitted that he had expended about £60, part thereof, on necessaries. He pleaded his infancy, and submitted that the action ought to be dismissed as against him, with costs.

The Plaintiff now moved on the said admissions in the statement of defence, 1, for an account of all moneys advanced by the Plaintiff to or on account of the Defendant before he attained twenty-one years of age, and expended by him on necessaries or in paying debts incurred for necessaries, and of the dates of such advances; 2, for an inquiry whether any and which of such sums had been repaid, and when; 3, for an order for repayment of the amounts found due, with interest at £4 per cent, and the costs of the action; 4, a declaration that the said amounts, with interest, and the costs of the action were a charge on the Defendant's reversionary interest in the sums of stock in the statement of claim mentioned, and that the said reversionary interest might stand charged accordingly; 5, in default of payment, for foreclosure.

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Farwell, for the Plaintiff:—

1. An infant is liable to repay money lent to him for, and expended by him on necessaries. The person advancing the money stands in the place of the tradesman who supplies the necessaries: *Marlow* v. *Pitfield* (1). The Plaintiff is therefore entitled to an inquiry in the terms of the notice of motion, which is framed on the inquiry directed in *Jenner* v. *Morris* (2). He is also entitled to an order for the payment of the amount found due on such inquiry.

2. An infant can give security for money lent to him for, and expended by him on necessaries. An infant can himself do that which he can be compelled by process of law to do: *Coke* upon *Littleton* (3). He could have been compelled to charge his interest in these sums of stock; the Plaintiff might have sued him at law, and recovered judgment against him, and have had such judgment declared a charge on these sums of stock under the Judgment Acts, as was laid down by Lord Justice *James* in the case of *In re Howarth* (4), where his Lordship said: "I apprehend that here, if the mother were to sue the Petitioner for necessaries supplied to him, a judgment would be obtained by which his inheritance would be bound."

The Plaintiff would thereby have become an equitable mortgagee, and therefore entitled to foreclosure. The Defendant could therefore bind his interest by this mortgage.

Further, an infant can bind his estate by a deed which is for his own benefit. "If an infant bargain and sell his land for money for commons, or teaching, it is good with averment; if for money, otherwise": *Bacon* on Statute of Uses (5).

[JESSEL, M.R.:—"Good" in that passage must mean "voidable" as distinguished from "void."]

In *Maddon* v. *White* (6), *Buller*, J., said: "All the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit; and Lord *Mansfield*, in *Drury* v. *Drury* (7),

(1) 1 P. Wms. 558.
(2) 3 D. F. & J. 45.
(3) Page 171 a.
(4) Law Rep. 8 Ch. 415, 418.
(5) Law Tracts, p. 355.
(6) 2 T. R. 159, 161.
(7) Dom. Proc. 26 May, 1762.

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laid it down as a general principle that if an agreement be for the benefit of an infant at the time it shall bind him. Lord *Hardwicke* afterwards adopted this rule."

[JESSEL, M.R.:—There must be some mistake in the report of what *Buller*, J., is stated to have said. No case can be found in which Lord *Mansfield* or Lord *Hardwicke* had laid down any such general principle.]

In this case it was for the infant's benefit to escape the costs of an action for the amount of the debt; an infant might starve if he could give no security. It cannot be for the infant's benefit to drive the creditor to obtain a charging order.

Davey, Q.C., and *W. G. Walker*, for the Defendant, were not called on as to the second point.

Judgment.

JESSEL, M.R., made an order in the terms of the 1st, 2nd, and 3rd paragraphs of the notice of motion above set out, except as to the costs of the action, which he reserved, and then proceeded:—

There is no doubt, as a general rule, that deeds by infants are voidable. That has been decided in several cases, one of which is the well-known decision in *Lumsden's Case* (1). There have been cases where a deed was executed in pursuance of an express obligation on the infant to execute the deed, and other cases in which the instrument was a mere accessory to some other act which he was bound to perform; but they are well-known exceptions, which are very plain and very simple. This case has no relation to them whatever.

This is a case in which an infant borrows money of a money-lender, and executes a charge by deed on his reversionary interest. Of course there is no legal obligation upon him to execute any such deed. The mere fact that a portion of the money was wanted for necessaries does not impose on him any such legal obligation. It is quite clear, therefore, that that deed is not binding upon him until he attains the age of twenty-one years.

Then it was said that, although it was not binding on him directly, it might be binding on him indirectly; and I was referred to *In re Howarth* (2), which was a decision of the Lords Justices

(1) Law Rep. 4 Ch. 31. (2) Law Rep. 8 Ch. 415.

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relating to the jurisdiction of the Court as *parens patriæ* in charge of infants' estates, in which reasons are given for the exercise of the jurisdiction. But those reasons seem to me to have no bearing whatever on the consequences of an act done by an infant. The Court may, by acting under a delegated power which the Crown possessed, being the guardian of all infants, be enabled to charge an infant's property when he could not charge it himself; and the very reason which may render it necessary for the Court to do it is that the infant cannot do it without; therefore, if the Court could not do it, nobody could do it. It seems to me, therefore, that, as far as the reasons which are given go, they rather shew that the infant could not do it. I think that there is no foundation for the argument which has been adduced before me that this deed is binding on the infant.

Solicitors: *C. R. S. Hooper; Halse, Trustram, & Co.*

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EVANS *v.* BUCK.
BUCK *v.* EVANS.

[1876 E. 43.]

Practice—Joinder of Defendant—Claim for Alternative Relief—Rules of Court, 1875, Order XVI., rr. 3, 6.(a)

Under Rules of Court, 1875, Order XVI., rules 3, 6,(a) a person cannot be joined as Defendant to a counter-claim against whom there is only a claim for relief in one of two inconsistent alternatives.

Statement.

DEMURRER TO COUNTER-CLAIM.

The Plaintiffs in the first action were the trustees of a settlement made on the marriage of Mr. and Mrs. *Kekewich*. The Defendant was *Ann Buck*, the widow and executrix of *L. Buck*, the father of Mrs. *Kekewich*.

It was alleged by the statement of claim that by the said settlement *L. Buck* had covenanted with the trustees that after his death, or in certain events (which happened), his heirs, executors, and administrators should, during the life of *Ann Buck*, pay to

(a) See W.N. (1875) 211, 248.

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the trustees interest on a sum of £7000 upon the usual trusts, and that the sum of £6167 was now due in respect thereof. The trustees claimed that *Ann Buck*, as executrix of *L. Buck*, might be ordered to pay to them that sum out of his estate.

Ann Buck filed a counter-claim against the trustees, and also against Mrs. *Kekewich*, a tenant for life under the settlement, as Defendants, alleging that *L. Buck* had appointed two sums of £6000 and £4000 to Mrs. *Kekewich;* that thereby, according to the true construction of the covenant contained in the settlement, the same was satisfied; that the intention of the parties to the settlement was according to that construction; and claiming a declaration that the covenant was satisfied; or if, in the opinion of the Court, that was not the true construction of the settlement, then that the settlement might be rectified so as to carry out the alleged intention of the parties, and that there might be discovery as to the negotiations which led to its execution.

Statement.

To this counter-claim a demurrer was put in by Mrs. *Kekewich*.

Argument.

Chitty, Q.C., and *Phear*, in support of the demurrer:—

This counter-claim is for alternative relief founded on inconsistent allegations. If the object is to obtain a declaration that the covenant in the settlement was satisfied in the manner alleged, then there is no necessity to make Mrs. *Kekewich* a Defendant; but the Plaintiff in the second action cannot at the same time allege that the settlement is right according to the construction for which she contends, and also claim relief on the footing that it is wrong.

Davey, Q.C., and *Colt*, for the Plaintiff in the second action:—

The counter-claim is good in law. There is nothing to prevent Mrs. *Kekewich* being joined as a co-Defendant. It is not contended that she would not be a proper party to an action for rectification of the settlement, and the fact of her having no interest in the alternative relief which is claimed is no reason why she should not be made a Defendant. By Rules of Court, 1875, Order XVI., rule 3, "all persons may be joined as Defendants against whom any relief is alleged to exist, whether jointly, severally, or in the alternative."

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JESSEL, M.R.:—

Under the old practice no man could file a bill for alternative relief founded on inconsistent allegations. This counter-claim says, in effect, that the settlement is right in form and in substance, but if the Court should be of opinion that it is not, then it claims that it may be rectified, and for that purpose makes a person a party who was not a party to the original action. That person demurs to the counter-claim, and says, "If you fail to establish a case for rectifying the deed, you have no reason for bringing me into an action with which I have no concern."

The same rules of pleading which prevailed under the old law prevail now, unless there is anything in the *Judicature Act* or in the new Orders or Rules which prevents it. I am referred in support of the counter-claim to Rules of Court, 1875, Order XVI., rule 3, which provides that "all persons may be joined as Defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative;" but it does not say in an inconsistent alternative. The 6th rule provides that when a Plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more Defendants to the intent that the question as to which, if any, of the Defendants is liable, and to what extent, may be determined as between all parties to the action. It is clear that these rules do not in express terms apply to a counter-claim, nor can they be taken to overrule the old practice of the Court, and, considering the terms of Order XXII., rule 9, I am of opinion that such a form of litigation ought not to be allowed. The demurrer must be allowed with costs.

Solicitors: *G. E. Philbrick; Langley & Gibbons.*

KING *v.* GEORGE.

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[1876 K. 193.]

Dec. 19, 20.

Will—Construction—General Bequest—Articles specifically enumerated—Ejusdem Generis.

A testatrix made her will in these words:—"I, *S. G.*, do bequeath to *A. G.* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to *H. G.*; the servants in the house who have been a year with me to receive £10, and clothes divided among them; also all kitchen utensils:—

Held, that the bequest was not limited to the articles specifically bequeathed, but that the will passed the whole of the personal estate of the testatrix.

Statement.

THE will of *Sarah George*, dated the 25th of May, 1874, was as follows:—"I, *Sarah George*, do bequeath to *A. K. George* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to *Herbert George*, son of *Frederick George*. The servants in the house who have been a year with me to receive £10, and clothes divided among them. Also all kitchen utensils." The testatrix, in addition to the articles comprised in and specifically bequeathed by her will, was possessed of moneys and securities for money at her bankers, furniture, horses and carriages, wines, and other personal estate of considerable value to which the Plaintiffs, who were her next of kin, claimed to be entitled. The Defendant, *A. K. George*, however, claimed on behalf of himself and *Herbert George* to be entitled to the whole of such personal estate under the terms of the will. The question was raised upon demurrer whether *A. K. George* and *Herbert George* took the whole of the personal estate of the testatrix, or only the articles specifically bequeathed.

Argument.

J. Pearson, Q.C., and *Rigby*, for the demurrer:—

This is a very short and simple will, but it raises a question which has on various occasions been argued before the Courts of Chancery, and the authorities have not always been uniform. The first question is as to the intention of the testatrix. Did she intend to die intestate as to any portion of her property? because she had considerable property both real and personal besides that

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which is comprised in the words she has used. It is submitted that the first part of the single clause of this will, "I bequeath all that I have power over," clearly denotes that she intended to give everything she had. If so, can it be said that these words are cut down by an enumeration of the articles following the general bequest? The leading authority upon this subject is *Bridges* v. *Bridges* (1), where the testator said: "I give the remainder of my estate, namely, my Bank stock, *India* stock, *South Sea* annuities, to my son, *B. Bridges*, and I do hereby make him sole executor." It was there held that the enumeration of certain specific property did not cut down the general gift of the remainder of his estate. That decision has been acted upon ever since, and particularly by Sir *W. Grant* in *Chalmers* v. *Storil* (2), who referred to *Bridges* v. *Bridges* and followed it without hesitation; so also did Sir *W. Page Wood* in *Dean* v. *Gibson* (3), and he also cited *Bridges* v. *Bridges* as a leading authority, as well as *Chalmers* v. *Storil* and *Ellis* v. *Selby* (4). *Hodgson* v. *Jex* (5) is an authority that the meaning of the words "other effects" will not be abridged by an enumeration of specific articles, and *In re Kendall's Trusts* (6) is equally conclusive.

Glasse, Q.C., and *Cary*, in support of the bill:—

The case of *Bridges* v. *Bridges*, and those which have followed it of a similar kind, cannot stand with *Timewell* v. *Perkins* (7), where the words were, "all my freehold lands in the tenure of the widow *L.*, and the residue of my estate consisting of ready money, plate, jewels, leases, mortgages, or any other things wheresoever or whatsoever I give to *A. H.* or her assigns for ever." There the Court held that there was an intestacy as to all the unspecified real estate, because there was no clear intention to pass it. This is an authority by which the Court must be bound. *Trafford* v. *Trafford* (8) is quite as strong, and *Enohin* v. *Wylie* (9) is a clear case in our favour; and the observations of the Master of the Rolls in

(1) 8 Vin. Abr. "Devise," 295, pl. 13.
(2) 2 V. & B. 222.
(3) Law Rep. 3 Eq. 713, 715.
(4) 7 Sim. 352, 364.
(5) 2 Ch. D. 122.
(6) 14 Beav. 608.
(7) 2 Atk. 102.
(8) 3 Atk. 347.
(9) 10 H. L. C. 1.

In re Kendall's Trusts (1) shew that but for the concluding sentences of the will he would have decided differently. *Stukeley* v. *Butler* (2) is an authority as to the effect of the word "videlicet;" and the case of *Enohin* v. *Wylie* (3) is one of the highest authority, having been decided by the House of Lords. There the words were, "The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me," and all the Judges were unanimous in deciding that those words were not merely a defective enumeration, but a description comprising the whole of the gift; and that the testator's property in the English funds was undisposed of. To decide in favour of the Defendant's contention would be to go very far beyond the effect of any previous decision. In all cases of imperfect enumeration reported, it will be found that, apart from such special circumstances as existed in *In re Kendall's Trusts*, they may be reduced to three classes: First, where the articles enumerated are found to comprise the bulk of the testator's property, as in *Bridges* v. *Bridges* (4) and *In re Goodyar* (5), decided on the authority of *Fisher* v. *Hepburn* (6); secondly, where, as in *Dean* v. *Gibson* (7), the word "money" has been used; and thirdly, cases where the words used have been of so wide and varied a meaning that no class can be found for them less extensive than that of general personal estate. Here the words are of the most trivial kind, "plate, linen, china, pictures, jewellery, lace," articles easily classified under the head of domestic ornaments and the like, comprising only a very small portion of the property of the testatrix, and having no reference to money or other general words.

The gift of £10 to each of the servants also shews that the testatrix must have intended the rest of her property to descend to her next of kin, who could pay the legacies out of the other property. These specific articles are to go to two individuals named, and it cannot be supposed that they were to pay the legacies out of the sale of those effects.

(1) 14 Beav. 608.
(2) Hob. 168.
(3) 10 H. L. C. 1.
(4) 8 Vin. Abr. "Devise," 295. pl. 13.
(5) 1 Sw. & Tr. 127.
(6) 14 Beav. 626.
(7) Law Rep. 3 Eq. 713, 715.

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J. Pearson, in reply:—

As to the case of *Wylie* v. *Wylie* (1), it is clear that the decision turned upon the intention of the testator, whether he meant to pass the stock in the English funds in addition to his Russian property, and it was not a decision affecting the question in this case.

[*Glasse* referred to *Rawlins* v. *Jennings* (2) and *Wrench* v. *Jutting* (3).]

J. Pearson:—In the latter case the question was as to the word "effects," and it was held that upon the construction of that particular will the word "effects" was not intended by the testator to have its most general operation, but only to pass things *ejusdem generis*.

Judgment.

MALINS, V.C.:—

This will is a very curious one, and it has given rise to the very learned and able arguments which I have had the pleasure of hearing from the counsel on both sides. The will which I have to construe is in these very few words:—[His Lordship read the will.] The question I have to determine is whether this will passes all the property of the testatrix, or whether it passes only that property which is enumerated under the words "plate, linen, china, pictures, jewellery, lace." If the construction is that it passes only those things, then the testatrix has to a great extent died intestate, for she had real estate, a house in which she lived, which has been contracted to be sold for a sum of £1500, and she had also property of various other descriptions: and therefore, if she has died intestate with respect to the great bulk of it, the heir-at-law will be entitled to the real estate, and the next of kin will be entitled to most of the property.

Now, first, let us consider what was the intention of the testatrix. If she intended merely to give her plate, linen, china, pictures, jewellery and lace, she might have put it in that way, and have said, "I do bequeath all my plate, linen, china, pictures, jewellery, and lace to so and so." That would have been a very simple form

(1) 1 D. F. & J. 410. (2) 13 Ves. 39.
(3) 3 Beav. 521.

of giving only those particular things. But it would have shewn that *ultra* those things she did not dispose of anything, and intended to die intestate. But does this will shew that intention? What does she mean when she says, "I, *Sarah George*, do bequeath to *A. K. George* all that I have power over"? If the will had stopped there, those words mean everything that she had testamentary power over; that is, all property which she could by her will dispose of. Then, having used those words, which are of general, comprehensive meaning, and as good words as could be used by the most skilful conveyancer—words abundantly sufficient to pass all her property—she goes on to enumerate, as is frequently the case, part of the property she has, not the whole of it, but only "the plate, linen, china, pictures, jewellery, lace." Now I cannot pretend to say that this is a will which any one would say is free from doubt, but to my mind it is clear that the testatrix did not intend to die intestate as to any part of her property, but that she intended, by the use of the words "all that I have power over," to give all her property of every description, and then foolishly and unnecessarily proceeded to enumerate part of them. Then, applying the rule in this case, that the first duty of the Court is to ascertain what was the intention, and then, having done that, to see whether there are words to carry that intention into effect, I am satisfied the intention was to dispose of all her property, and I am of opinion, both upon principle and authority, that the words are sufficient for the purpose. This subject, where wills are made in comprehensive form followed by an enumeration, has been a subject of difficulty to Judges for the last century and a half, and amongst the most eminent of them there has been a remarkable difference of opinion. But I cannot help thinking that the doctrine has been settled that where a testator gives his property generally by the words "all my property," or "all my estate," or "all that I have power over," as in this case, where he uses words sufficient to pass everything, and then proceeds to enumerate particulars—it is now, I think, pretty well settled that an enumeration of particulars does not abridge or cut down the effect of the general words.

Now, beginning with the first case which was cited by Mr. *Pearson*, decided by a very eminent authority, that of Lord *King*,

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Bridges v. *Bridges* (1). That is a case which has been cited and acted upon to a very great extent, I may say, ever since the decision was given, and I think it is a stronger case for a limited construction of the will than this is. Sir *Brook Bridges* gave certain things to his daughters and others, and then there was the following clause: "I give the remainder of my estate, namely," as in the present case, "my Bank stock, *India* stock, *South Sea* stock, *South Sea* annuities, to my son *B. Bridges*, and I do hereby make him sole executor." If this limited construction can be held to prevail, that was as clear a case as could be. If he had said, "I give him my Bank stock, *India* stock, *South Sea* stock and annuities," nothing more than those would have passed, because it would have been the only subject of the gift. But when he says, "I give the remainder of my estate," it shews that he intended to give everything, and the enumeration did not cut down the general disposition. Lord *King*, L.C., was of opinion that the latter words which came under the "viz." did not restrain the general words precedent, "the remainder of my estate," but were added by way of enumeration or description of the main particulars whereof his estate did consist, and not to restrain the word "estate" to those particulars, and the rather because immediately after follow the words "and I do hereby make him sole executor of this my will;" and when he disposes of the remainder of his estate it is plain he did not intend to die intestate as to any part of it." That is the criterion: did the testator, or did he not, his object being to dispose of all his property, intend to die intestate as to any part? and Lord *King* says he did not, because he gives all the residue of his estate, and then he makes an imperfect enumeration of what it consists. I am bound to say it is very difficult to reconcile the decision of Mr. Justice *Fortescue* in *Timewell* v. *Perkins* (2) with the decision in *Bridges* v. *Bridges*. But it is not necessary to do that, because I do not think, upon the whole, that *Timewell* v. *Perkins* has been considered as an authority so binding as that of *Bridges* v. *Bridges*, decided by Lord *King*, and I think I do sufficient to shew that by going at once to the decision in *Chalmers* v. *Storil* (3). I

(1) 8 Vin. Abr. "Devise," 295, pl. 13. (2) 2 Atk. 102.
(3) 2 V. & B. 222.

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cannot cite a higher authority than that of Sir *William Grant*, than whom no man more clearly and comprehensively grasped the details of all the cases which came before him. It is a case in which *Alexander J. Chalmers* disposed of his property thus: "All my estates whatsoever to be equally divided among them, whether real or personal, making no distinction in favour of the male, as it is my intent that my daughter shall have an equal share with my son of all my property after paying the following legacies," specifying two annual sums to two persons for life, and at their deaths to devolve to his children equally. Having made a general disposition of all his property, real and personal, the testator then specified the property bequeathed by him as consisting of freehold ground rents, money on mortgage, American bank stock, an estate in *America*, &c., and proceeded thus: "It is my further will and intention, that in case of the death of my dear wife, *Anna Maria Chalmers*, the portion or part hereinbefore bequeathed her shall descend to my two children equally; and in the event of both their deaths before her, she shall enjoy during her life the portion or parts left or bequeathed by me in this instrument unto them; and in the event of the deaths of my said dear wife and two children (that is to say, supposing my two children, now infants, die without issue), it is my further will that my mother and sister *Francina* before mentioned shall inherit after them the whole of the said properties during their lives, and after their death that it should go in regular descent to the children of my sisters." The testator appointed his wife and the Defendant *Storil* his executors. The bill contended that the Plaintiffs, the two infant children, were entitled each to one full third part of the clear residue of the testator's real and personal estate, and that the Plaintiff, the widow, was entitled to the other third for life, with remainder to the two children in case they survived her, and that the widow ought to be put to her election as to the right to her dower, and so forth. The Master of the Rolls, Sir *William Grant*, says, "As to the question whether the whole personal estate passes by the will, my opinion is that it does. The testator gives all his estate whatsoever, whether real or personal"—here it says, "all I have power over," which is as comprehensive—"to be divided between his wife and children. The subsequent enumeration of what he supposed his

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property to consist does not limit the gift to the particulars specified. Intending to give everything he could, he has incorrectly stated what he had. In the case of *Bridges* v. *Bridges* (1) the words were more restrictive, 'viz.,' being immediately added to the gift of the remainder of the estate, but Lord *King's* opinion was that the words following the 'viz.' did not restrict the preceding general words, but were added by way of enumeration or description of the chief particulars whereof his estate consisted, which construction was strengthened by the words immediately following appointing his son sole executor; and when the testator disposed of the remainder of his estate, it was plain that he did not intend to die intestate as to any part of it. Here the testator disposes of the whole of his personal estate, and therefore does not mean to die intestate as to any part of it." In my opinion every word of that is applicable to the present case.

Then this subject has been a matter of consideration very recently in the case of *Dean* v. *Gibson* (2). That, I think, is a stronger case for the conclusion I arrive at than the present. *Alice Gibson Maw*, spinster, made her will in the following terms: "I, *Alice Gibson Maw*, being perfectly collected and in my right mind, wish to express my earnest desire that my personal property,"—that is, all her personal property,—"consisting of money and clothes, shall be equally divided amongst my three surviving sisters." The question was, whether the general estate passed, that is, that part of her property which was neither money nor clothes. The Vice-Chancellor Sir *William Page Wood*, in 1867, decided thus: "There is a case, if I remember right, before Vice-Chancellor Sir *L. Shadwell*, resembling the present (3). The question also is touched upon in Mr. *Roper's* book on Legacies, under the chapter entitled 'Rights of Specific Legatees.' A case of *Bridges* v. *Bridges* is there cited, and Lord *King* held that not those particular funds only, but the whole residuary estate, passed; the specification not being added in a restrictive sense, but as an enumeration of the chief particulars of which the estate consisted. Then the reader is referred to *Chalmers* v. *Storil* (4), in which Sir *William Grant*

(1) 8 Vin. Abr. "Devise," 295, pl. 13.

(2) Law Rep. 3 Eq. 713.

(3) *Ellis* v. *Selby*, 7 Sim. 352, 364.

(4) 2 V. & B. 222.

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followed Lord *King's* decision." This is Vice-Chancellor *Wood* in 1867, acting on *Bridges* v. *Bridges* (1) and *Chalmers* v. *Storil* (2), and coming to the conclusion that "my personal estate consisting of money and clothes" passed everything besides money and clothes.

Now, this testatrix sitting down to make her will, which is a holograph will, intending, as I am satisfied, to give all the property she has, thinks it not sufficient to give "all I have power over," but she goes on to specify part of her property, not for the purpose of restricting it, but for the purpose of allowing it to remain as it was originally, universal. Then Mr. *Glasse* says, "all" could not have been intended, because she makes two specific dispositions. She says "all I have power over," and then it is to be divided between two persons, the original legatee being one, and she says: "The servants in the house who have been a year with me to receive £10 and clothes divided among them; also all kitchen utensils." There is nothing inconsistent with that, because she says all that I have in the world over which I have power, but out of what I have £10 is to be given to the servants who have been a year with me, and my clothes and the kitchen utensils. These authorities, *Bridges* v. *Bridges*, Lord *King's* decision, *Chalmers* v. *Storil*, Sir *William Grant's* decision, *Dean* v. *Gibson* (3), Vice-Chancellor *Wood's* decision in 1867, are all perfectly consistent, and all bear out the construction which I put on this will. *Timewill* v. *Perkins* (4), I have said, it would be difficult to reconcile with these authorities. I do not think it is reconcilable, and I think that this case of *Timewell* v. *Perkins* is not an authority to be followed. With regard to *Trafford* v. *Trafford* (5), looking at the note in page 140 of *Atkyns*, the same observation may be applied to that. With respect to the case of *In re Kendall's Trusts* (6), what is said by Lord *Romilly* is not an authority in point, because he had before him a will which concluded with a passage giving all the residuary estate, and all that Lord *Romilly* cited it for was to shew that if that clause had not been in, he would have come to a different conclusion. That is not any authority standing in the way of my decision in this case.

(1) 8 Vin. Abr. "Devise," 295, pl. 13.
(2) 2 V. & B. 222.
(3) Law Rep. 3 Eq. 713, 715.
(4) 2 Atk. 102.
(5) 3 Atk. 347.
(6) 14 Beav. 608.

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Now the authority that I have found most embarrassing is that of *Wylie* v. *Wylie* (1). That is a very remarkable case, in this respect: that upon the construction of such a will all the Judges who gave their opinions on it were unanimous. First, Vice-Chancellor Sir *W. P. Wood;* secondly, the Lords Justices *Knight Bruce* and *Turner*—that is three; then in the House of Lords, under the title *Enohin* v. *Wylie* (2), Lord *Westbury*, Lord *Cranworth*, and Lord *Chelmsford*, all perfectly agreeing that in that case the general residue, that is, that part of the testator's property which consisted of money in the funds in *England*, did not pass. But I am bound to say that I come to the conclusion that the decision did not proceed on the ground of the enumeration of the property being erroneous or defective, but upon that which they considered to be the intention of the testator. And in that view, of course I assume that it was right. Such an array of authorities must be binding on the Court. In that case Sir *John Wylie*, who was an eminent English physician, had been long resident in *Russia*, where he seems to have been possessed of very considerable property, and he made, as I collect, his will in *Russia*. In making this will was it his intention to dispose of all his property, wherever it might be, or was he disposing of his Russian property only? My opinion is that the House of Lords and the Judges in the Courts below must have proceeded on the ground that he intended to dispose of his Russian property only. And, accordingly, I find Lord *Westbury* puts it on that ground; if he intended to dispose only of his Russian property, the money in the English funds would not pass. He says: "I dispose of all my moveable and immoveable property honestly acquired by myself in the following manner." If he had only used these words, "I dispose of all my moveable and immoveable property," everything in the world would have passed. Then he goes on to describe the property in *St. Petersburgh*, his household furniture there, his farms and his country house in the neighbourhood, all of which, together with the peasants "(excepting only those of my serfs who for their faithful and zealous services to my person shall be set free), and all my woodlands, with farms and country houses, and in general with all the economical establishments therein, I destine to be sold,

(1) 1 D. F. & J. 410. (2) 10 H. L. C. 1.

The money proceeds of all the above, as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided into ten equal parts." Now, did he intend to give the money and proceeds, and all the above, that is, the property in *Russia*, "as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me"? That was a question of intention. It was not an erroneous enumeration of property. It was not a case in which he said, "I give all my estate," and then proceeded with the enumeration of it, but it was a bequest by which he gave certain property, with respect to which all the learned Judges came to the conclusion that he did not intend to dispose of his property in the English funds, and they mainly proceeded on the ground that he was directing the disposition of his Russian property, and restricted it to that.

Considering the eminence of such authorities as Lord *King*, who was one of the greatest lawyers, whose authority in this case of *Bridges* v. *Bridges* (1) has been so long relied upon, and the authority of Sir *William Grant* in *Chalmers* v. *Storil* (2), if it had been the intention of the Judges to overrule these they would have distinctly said so, and would not have left the profession in the difficult position of its being inferred that their decision was of a contrary nature. I assume, therefore, that it was contrary to their intention to overrule those authorities which have so long been acted upon, and I do not consider that I am hampered by *Wylie* v. *Wylie* (3). It was in fact a different question, it was not whether a general gift of property should be cut down by defective enumeration, it was a question what was the original gift.

Now with respect to the other cases, I do not think *Fisher* v. *Hepburn* (4), which was cited by Mr. *Cary*, is in opposition to the conclusion that I arrive at, because there the Master of the Rolls held that everything passed. The gift was in these words: "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever"—which are as comprehensive words as can be used—"canal shares, plate, linen, china, furniture, I give, devise, and bequeath the same to my said wife." That is a case, there-

(1) 8 Vin. Abr. "Devise," 295, pl. 13.
(2) 2 V. & B. 222.
(3) 1 D. F. & J. 410.
(4) 14 Beav. 626.

6 Jur. N.S. 259

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fore, entirely in favour of the demurring parties in this case. If the words had stood there, "I give all my canal shares, plate, linen, china, and furniture to my wife," nothing else would have passed. But he says, "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china, and furniture, I give, devise, and bequeath the same to my wife." It is said that the words used took everything of that kind away, but the Master of the Rolls says, "I think these authorities do not affect or touch the case before me. The case of *Parker* v. *Marchant* (1) has been relied on in reference to the circumstance that the general words precede the enumeration. But, as was observed by Sir *William Grant* in *Cambridge* v. *Rous* (2), the latter are not words of restriction. They are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a 'videlicet,' a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles. This is only a common residuary bequest. I am of opinion that the debt in question passed under the residuary clause to the widow."

With regard to the case that Mr. *Glasse* referred to while Mr. *Pearson* was replying, and for which I was much obliged to him—the case of *Rawlins* v. *Jennings* (3)—the reason of the decision there is given in the passage that Mr. *Glasse* read to me, in which Sir *William Grant* says this: "The second question arises on the widow's claim of the whole residue of the personal estate as passing to her under the general word 'effects.'" Now that would clearly pass all the residue. Then Sir *William Grant* says: "That claim cannot be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz., household furniture." Therefore, although the word "effects" would pass everything, yet when you find that, having given his wife all his shares, he gives other property afterwards, that, as Sir *William Grant* says, shews that he did not intend the word "effects" to have its most general operation. With respect to

(1) 1 Y. & C. Ch. 290, 301. (2) 8 Ves. 26.
(3) 13 Ves. 39, 46.

the word "effects" unqualified and unexplained, I entirely agree with the observations that were made by the Master of the Rolls in the case of *Hodgson* v. *Jex* (1), that when the word "effects" will include those things that are mentioned, that, as a general word, ought not to be cut down to things *ejusdem generis* with those named before, unless there is something clearly to shew that that was the intention.

Upon all these grounds I am of opinion that this is a general disposition of the testatrix's property; the consequence of which is that the demurrer will be allowed, and the Plaintiff, as the next of kin, has no interest in the estate. The costs will come out of the estate.

Solicitors: *H. Hill; Druce, Sons, & Jackson.*

(1) 2 Ch. D. 122.

V.-C. B.
1876
Dec. 21.

JEFFERYS *v.* FAIRS.

[1876 J. 21.]

Specific Performance—Mining Lease.

A., on the application of *B.* and *C.*, agreed to grant them a lease of a vein or seam of coal, called the *S.* vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called *X.*, at £100 per annum as certain or dead-rent, and royalties of 9*d.* per ton for the coal and 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of £10 per acre, and to expend not less than £500 in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1*d.* per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one year's notice.

On action by *A.* for specific performance, *B.* and *C.* alleged that the *S.* vein did not exist under the farm, and it was proved that on search it had not been found, but counter evidence was given to shew that the searches were insufficient:—

Held, that, under the agreement, *B.* and *C.* had, in consideration of the dead-rent reserved, obtained license to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that *A.* was entitled to specific performance of the contract whether the *S.* vein existed or not.

Statement.

THIS was an action for specific performance of an agreement, dated the 6th of July, 1874, by which the Defendants *Fairs* and *Kirkhouse* agreed "to take the vein or seam of coal called the *Shenkin* vein, and being about two feet thick, with the overlying and underlying beds of clay on and under the farm called *Llwyndu*, &c., *Glamorganshire*, such veins or beds being contiguous or in juxtaposition. Term sixty years from 29th September, 1874. Rent £100 per annum as certain or dead-rent, payable £25 at Lady Day, 1875, and £50 every subsequent half-year. Royalties 9*d.* per ton for the coal and 4*d.* per ton for the clay. Lessees to have any part of the farm above the *Swansea Vale Railroad* at the rent of £10 per acre, not being less than one acre, for the same term, and to expend not less than £500 in the erection of a manufactory and other buildings for the purpose of working the coal and clay. Way-leave for foreign coal and clay 1*d.* per ton. Lessees to have power to determine the lease at the end of the first three years of the term, on giving twelve calendar months' notice in writing to

the lessor. The lease to contain all proper and usual covenants, including a three years' average clause in ascertaining the amount of royalties."

"Memorandum.—This agreement is conditional on the taking of Messrs. *Cory, Yeo, & Co.* being restricted to the lower or deeper veins of coal and other minerals as verbally arranged with them."

Pursuant to this agreement the Defendants entered upon a portion of the land, which was on a mountain slope above the *Swansea Vale Railway*, and made excavations, and searched for coal and fire-clay, but did not succeed in finding the vein.

These operations were conducted by the Defendant *Kirkhouse*, who was a mineral surveyor, and on the 3rd of October, 1874, the Defendant *Fairs* wrote to the Plaintiff to inform him that they had completely failed in finding the coal, and that they had come to the conclusion that the vein of coal they were looking for must be running out there. They had found the fire-clay in its proper place, but of a very inferior quality, and no sign of any leader, such as they might expect, which would lead to the coal. "So we fear we must abandon it altogether, as it will not pay without we can make a good fire-brick to meet the market." In the course of the correspondence the Plaintiff wrote: "I took for granted that you knew the coal could be got as well as the fire-clay, which latter seemed to be your principal object in taking the lease. I told you in my last that on the faith of your agreement I reduced the rent payable by Messrs. *Cory, Yeo, & Co.* (who were working the lower or deep veins of coal) by one half, viz., £100 to £50; but I still hope you will persevere, and if you still fail I will consider to what extent I can fairly relieve you." In a subsequent letter the Plaintiff reminded *Fairs* that his partner, the Defendant *Kirkhouse*, being a mineral surveyor, "ought certainly to have satisfied you and himself about the coal before the agreement was made and signed." In the result, the Defendants, considering that it was out of the question to work the fire-clay without the coal, declined to have anything more to do with the property, and had refused to pay the dead-rent, and also the rent for the surface land of which they had taken possession under the agreement.

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Under these circumstances the Plaintiff commenced an action in which he claimed specific performance of the agreement of the 6th of July, 1874, and payment of the sums due for dead-rent under the agreement, and for rent of the surface land.

Statement.

The case raised by the statement of defence was, that the Defendants had entered into the agreement on the faith and in the assumption that there was coal to be got in the *Shenkin* vein; that they had ascertained by boring and searching in the ordinary way that there was no coal in the alleged *Shenkin* vein under the *Llwyndu Farm*, and that they accordingly repudiated the agreement, had given up possession of the land, and refused to pay any dead or surface rent, or to execute a lease.

In his evidence given in Court, the Plaintiff stated that the Defendants came and applied to him for the lease, and proposed terms which were accepted by him. He knew nothing of the *Shenkin* vein, and was first informed of its existence by the Defendants. There were no preliminary negotiations. Evidence was also given on behalf of the Plaintiff to the effect that the Defendants had not thoroughly and fairly tested the locality, as at the point selected by them the strata were loose, apparently indicating a slip of the ground caused by surface floods; and that although the *Shenkin* vein, which was visible, and being worked on the other side of the mountain three miles off, did not reach the trial hole made by the Defendants on the slope of the mountain, it was far from proved that the vein was not there; and in the opinion of the Plaintiff's agent, who had assisted the Defendants in their search, and was called as their witness, the experiments made were by no means conclusive or satisfactory.

Argument.

Kay, Q.C., and *Howell Jeffreys*, for the Plaintiff:—

The Defendants cannot resist payment of the annual sum for fixed dead-rent, which is reserved for the land demised, whether the coal is worked or not: *Phillips* v. *Jones* (1); and the reservation of a royalty for each ton of coal does not import into the contract a condition that there shall be coals capable of being worked: *Marquis of Bute* v. *Thompson* (2). Having taken the chance of the workings being more or less profitable, they cannot be released

(1) 9 Sim. 519. (2) 13 M. & W. 487.

from their contract, especially as they did not embark in the speculation in consequence of any representation made to them by the Plaintiff as to the existence of coal veins, or the probable chances of success in working them: *Mellers* v. *Duke of Devonshire* (1); *Jennings* v. *Broughton* (2). To coal mines, which are all liable to be interrupted by faults, the doctrine of *caveat emptor* is especially applicable: *Colby* v. *Gadsden* (3); *Ridgway* v. *Sneyd* (4); and the fact that property of such a speculative character has even turned out worthless, gives the Defendants no right to repudiate their agreement: *Haywood* v. *Cope* (5). In this case a very feeble attempt only has been made to search for this vein, and the evidence goes to prove that it exists, and might have been found by a more thorough search.

Sir *H. Jackson*, Q.C., and *Bevir*, for the Defendants:—

The agreement was to accept a lease of a specific vein of coal which has been found, after testing the property, to have no existence; and the effect of this total failure of the subject-matter, apart from any element of fraud, is to deprive the Plaintiff of any right to specific performance, and to entitle the Defendants to rescind the contract: *Fry's* Specific Performance (6); *Stanton* v. *Tattersall* (7). It is equally well settled that the vendor cannot recover from the purchaser upon a contract for the sale of goods, or shares, supposed to exist, but in reality either non-existent or worthless, and incapable of being transferred to the purchaser: *Hastie* v. *Couturier* (8); *Westropp* v. *Solomon* (9). In *Haywood* v. *Cope* there was a mine, the Defendant saw it, and thought he would make a good thing of it, and having taken the chance, he was held bound by his agreement. But here there is no mine, and by directing specific performance the Defendants would be ordered to take a lease of something which has no existence and cannot be obtained. We submit that in this, as in other cases, the burden of shewing that the property contracted to be demised

(1) 16 Beav. 252.
(2) 17 Ibid. 234.
(3) 34 Ibid. 416.
(4) Kay, 627.
(5) 25 Beav. 140.
(6) Page 251.
(7) 1 Sm. & Giff. 529.
(8) 9 Ex. 102.
(9) 8 C. B. 345, 371.

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or sold does exist, is on the lessor; and as, upon the evidence, he has not complied with this condition, his action must be dismissed.

BACON, V.C.:—

The Defendants contend that specific performance cannot be granted, and that they are entitled to repudiate the contract because the Plaintiff has not proved the existence of the mine under the demised property. I have no doubt, however, that mining agreements are not dependent for their efficacy upon any such rule as that. What is the bargain between the parties? The Defendants take their chance of finding that the property contains minerals and of getting all they can out of it. Even in the case of a mine in actual working, it may turn out most unprofitably. How, then, is the lessor responsible? What has he to do with it, unless I am to read the agreement as containing a guarantee on his part that the *Shenkin* vein existed under the demised property? I am clearly of opinion that I cannot do so. The Defendants, knowing at least as much about it as the Plaintiff did, apply to him for a lease for the purpose of working the fire-clay and the coal, the latter being necessary for working the former with advantage. He, not knowing anything about it, takes their word for the truth of the representation, and agrees to grant the lease. In the agreement there is not one word as to guaranteeing that there is this *Shenkin* vein, or that coal will be found under the property to be demised. All that it amounts to is a license to enter and search for the vein of coal, and make what they could of it. It has been said that a lease of minerals amounts to a sale and purchase out and out. In whatever sense that may be true, it can have no application to payment of a dead-rent which is reserved in respect of this license to enter and search, and is payable whether there is a vein of coal or not. What is there to exempt the Defendants from paying the dead-rent because they have not yet succeeded in finding the vein? There is no analogy whatever to the case of a man selling shares which are utterly worthless, or a cargo of corn which had no existence. There is nothing like fraud on the part of the lessor. The Defendants have, in fact, got all they bargained for, which

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was the chance of finding the vein of coal under the particular property, and a whole series of authorities shews that that is the true way of looking at transactions of this kind. It is true that in some of the cases there was an executed lease, but that is an immaterial circumstance. The important point is, whether the Defendants got what they contracted for. They say they did not, and that, therefore, the bargain is bad. But I think that the thing bargained for was simply the right to go upon the land and search for and get the minerals, and make such a use of it as they thought fit. They knew the hazard attending it, and, knowing it, they protected themselves by having the lease made determinable at the end of three years. That is the protection which they have under the agreement. They have tried experiments, which appear not to have been very conclusive (for one of the witnesses says it was in the wrong place), and have not yet found any coal. It would be against reason, against justice, and against the whole chain of authorities to let the Defendants off their bargain. The lessor has complied with his part of the bargain; and there is no reason why the dead-rent should not be paid.

The Plaintiff is therefore entitled to judgment for specific performance, and an order for payment of the dead-rent that has accrued up to this time.

Solicitors: *Vizard, Crowder, & Co.*, agents for *John Gaskoin, Swansea; Nation & Stephens*, agents for *Richard Jenkins, Swansea.*

V.-C. B.

In re COOKES' CONTRACT.

1877
Jan. 11.

Will—Construction—Power of Sale of Real Estate—Tenant for Life—Whether co-Trustees and co-Executors surviving the Tenant for Life can sell.

Testator, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, and benefit of herself and all his children, and that upon her death all his property both real and personal should be "fairly and equally divided" among "all" his children, and that the property which his three children by a former marriage had derived should be brought into hotchpot from the time of his decease, "so as to form one common fund," appointed his wife "and her two brothers, *W. C.* and *R. C.*, trustees and executors" of that his will; and for the purpose of management authorized and empowered them to sell and convert into money all or any part of his said real and personal estates, or to mortgage or let the same or any part thereof, and invest the proceeds as therein mentioned. Testator directed and empowered his "said trustees and executors" to carry on the farm "by and out of" his assets "for the maintenance, support, and benefit of" his wife and children; and subject thereto declared that his real and personal estate, "and the proceeds thereof" should be held in trust for all his aforesaid children, in equal shares; the personal property to which the children by his first marriage had become entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:—

Held, that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the concurrence of the children.

Statement.

ADJOURNED SUMMONS.

Aquila Robins, by his will, dated the 1st of October, 1831, after reciting that his family then consisted of his wife and four children by her, naming them, and of three children by a late wife, naming them also, and that the three last-named children were entitled as next of kin of an intestate, and under a will, to certain property, the amount of which was not then yet ascertained, proceeded as follows:—"And whereas I am the owner of certain lands and hereditaments, and am also the occupier of the *Hayfield Lodge Farm* under lease, and am possessed of the stock and effects thereon, and of other personal estate; and whereas I am desirous that the said farm, or any other farm which I may occupy at my death, shall be carried on during the life of my said wife, for the

maintenance, support, and benefit of herself and all my said children, and that upon her death all my property both real and personal should be fairly and equally divided among all my said children, and any other I may hereafter have; and that the personal property which my children by my first wife have derived from their grandfather and uncle shall be brought into hotchpot from the time of my decease, so as to form one common fund with the property which I may then leave; now therefore for carrying such intentions into effect I do hereby appoint my said wife and her two brothers *William Cooke* and *Robins Cooke* trustees and executors of this my will and testament, and I do hereby authorize and empower them to manage and conduct my affairs and business, and all matters relating to my real and personal estates (except as hereafter mentioned) for the benefit of my family, in such way and manner as they in their discretion shall think fit; and for that purpose I authorize and empower them to sell and convert into money all or any part of my said real and personal estates, or to mortgage or let the same or any part thereof, and to invest the proceeds arising from any sale or conversion into money which shall not be immediately wanted, in the funds or upon real securities, upon the trusts of this my will, and that their receipts shall be a good discharge and indemnity to all persons dealing with them for all moneys which in such receipts shall be expressed to be received. And I direct and empower my said trustees and executors to carry on the aforesaid farm, or any other farm I may occupy on lease or otherwise at the time of my decease, by and out of my assets, for the maintenance, support, and benefit of my said wife and children; but I expressly declare that my said wife shall have the sole management of the said farm during such time as she shall remain my widow, without any interference or control on the part of my other executors. And it is my will that, subject to the provision hereinbefore contained for the maintenance and support of my said wife and children, my said real and personal estates and the proceeds thereof shall be held in trust for all my aforesaid children or any other child or children I may hereafter have, in equal shares and proportions (the personal property to which the children by my first marriage have become entitled under their grandfather and uncle being brought into hotchpot

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from my decease as hereinbefore mentioned), and to be vested interests at my death in such of them as shall then have attained the age of 21 years, and in the others of them when they shall severally attain that age, or on death under that age leaving lawful issue then living, and to be paid and payable to them as soon after the death or marriage of my said wife and the said ages are attained as conveniently can be. Provided, that if any of my said children shall happen to die under the age of twenty-one years without leaving any lawful issue then living, then the legacy or share of him or her so dying and all accruing shares of legacies under the provision shall go and belong to the survivors or survivor who shall attain the age of 21 years or die leaving issue then living, and be payable together and with his or their original legacies or shares. And I authorize and empower my said trustees and executors, with the consent of my said wife during her widowhood, to levy and raise by such ways and means as to them shall seem meet, out of my real and personal estate, and to advance and lend to any of my said children such part of their expectant portions as they my said trustees and executors shall think right, taking satisfactory security for the payment of the interest of the money so advanced during my said wife's life; the sum nevertheless so raised and advanced to be taken as part of the legacy of the child or children for whom the same shall be raised, and accounted for accordingly. And in case my said children by my first marriage, or any or either of them, shall refuse or decline to bring into hotchpot the personal property which they have derived from their said grandfather and uncle, then I declare my mind to be that the children or child so refusing shall not be entitled to any benefit under this my will. And I declare that in case my said wife should marry again, all the power and authority, benefit and advantage, given to her by this my will shall thenceforth cease and determine, and in lieu and stead thereof it is my will and desire that she should receive the sum of £5 annually from each of my children during the then remainder of her life; and it is not my intention that any part of their legacies should be invested or withheld to secure the payment thereof, but that she should only have a remedy against them personally for the same. And I direct that all my debts and funeral and testamentary

expenses shall be paid and satisfied as soon after my decease as conveniently can be."

Testator died on the 7th of August, 1833.

The will was proved on the 12th of October, 1833, by *Elizabeth Robins*, the widow, and *William Cooke*, power being reserved to *Robins Cooke*, the other executor, to prove. This he had not done.

On the 5th of December, 1835, *Elizabeth Robins* was admitted to certain copyholds to hold to her upon the trusts and according to the form and effect of the will.

On the 5th of July, 1876, *Elizabeth Robins* died.

On the 8th of September, 1876, *William Cooke* and *Robins Cooke*, the surviving executors, put up the freeholds and copyholds comprised in the will for sale by public auction, under conditions, one of which was as follows:—

"... The vendors shall, subject to these conditions, make and execute to the purchaser of each lot proper assurances thereof, such assurances to be prepared by and at the expense of the purchaser, but the vendors, being the surviving donees of a power of sale contained in the will of the said *Aquila Robins*, will enter into no other covenant than a covenant that they have not encumbered the property; and the concurrences of the parties beneficially interested in the property or purchase shall not be required."

At the sale, *William James Simpson* became the purchaser, and a contract for sale and purchase was made in the usual manner.

Upon the abstract being sent the purchaser's solicitors asked, "How is it proposed to make a good title to the property? The will evidently contemplates the exercise of the power of sale in the lifetime of the widow, and is not given to the surviving trustees. On the death of the widow the real estate vests in the children in equal shares, and no good title can be made without their concurrence."

In answer, the vendor's solicitors said they felt no doubt as to the ability of the surviving donees of the power of sale to confer a good title on the purchaser.

Ultimately this summons was taken out on behalf of the vendors, in the matter of the contract, and of the *Vendor and Purchaser*

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Act, 1874, submitting for the opinion of the Court, "whether *William Cooke* and *Robins Cooke* have, either expressly or by implication, a power of sale over the real estate of the testator, and whether they can make a valid assurance of both the freehold and copyhold property to the purchaser without the concurrence of any other person or persons, so as to vest such property in him in fee simple;" and another alternative question, which it is not necessary to state.

Argument.

Kay, Q.C., and *Edward Wilkinson*, for the applicants, the vendors:—

The surviving trustees and executors have ample power, not only to sell but alone to convey this estate upon the wife's death.

One of the directions is that upon the wife's death the property is to be equally divided, she being appointed one of the trustees and executors to whom a power of sale is given. That shews that the power of sale was intended to survive to the surviving trustees and executors. Then follow powers of management, leasing, and mortgaging. Could not the surviving trustees, after the death of the wife, have mortgaged?

Afterwards come the words, "shall be held in trust for all my aforesaid children," shewing the existence of a trust after the death of the wife.

It is not necessary that there should be an express devise in order to vest the legal estate in trustees, if there be a clear intention that the real and personal estate shall be held in trust: *Lewin* on Trusts (1); *Jarman* on Wills (2); *Trent* v. *Hanning* (3); *Doe* v. *Gillard* (4); *In re Turner* (5); *Ex parte Mornington* (6); *In re Boyce* (7).

Supposing this to be a mere common law power, independent of the *Statutes of Uses*, such a power will survive, it is said, so long as the plural number remains: *Sugden* on Powers (8). That condition is fulfilled here.

(1) 6th Ed. p. 189.
(2) 3rd Ed. vol. ii. p. 271.
(3) 1 B. & P. (N. R.) 116; 10 Ves. 495; 7 East, 97.
(4) 5 B. & A. 785.
(5) 2 D. F. & J. 527.
(6) 4 D. M. & G. 537.
(7) 12 W. R. 359.
(8) 8th Ed. p. 126.

In *Houell* v. *Barnes* (1) it was held that where the executors took an authority only, the survivor could sell: *Brassey* v. *Chalmers* (2).

"A power given by a will or by an Act of Parliament—as in the instance of the Land Tax Redemption Acts—to sell an estate, is a common law authority; the estate passes by force of the will or Act of Parliament, and the person who executes the power merely nominates the party to take the estate:" *Sugden* on Powers (3).

In the direction respecting management it will be observed there is a special proviso that the widow is to have the sole management during her widowhood, shewing by inference a plain intention that upon her widowhood ceasing the power was to survive to the other trustees and executors.

B. B. Rogers, for the Respondent, the purchaser:—

The surviving trustees and executors have no legal estate; they can convey no interest either at law or in equity.

1. The will contains, not a trust for sale, but merely a power to sell. That appears to be conceded by the other side.

2. That power of sale is restricted to the lifetime of the widow: first, by the express terms of the will; secondly, by the law, which will not allow a general power to be exercised after the estate has become indefeasibly vested in some person or persons.

3. Without disputing any of the authorities, and admitting that the legal estate may possibly have been vested in the trustees during the life of the widow—whether it was or was not being now immaterial—the legal estate remained in them only during the life of the widow, and has now wholly ceased. At the death of the wife the real and personal estate is not directed to be converted. The intention was that it should go to the children just as it stood. Only during the widow's life were she and the trustees to have powers of management. The words, "I authorize and empower" do not create a trust for conversion. Afterwards the testator says, "I direct and empower," words which seem more nearly to create

(1) Cro. Car. 382. (2) 4 D. M. & G. 528.
(3) 8th Ed. p. 45.

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Argument.

a trust; but if so, it is a trust co-extensive only with the life of the wife.

[BACON, V.C.:—Supposing the wife had died the day after the testator's death, and there had been infants?]

The power would have been at an end. The law will not permit a general power to be exercised when the estate has once vested in possession: *Lantsbery* v. *Collier* (1); *Doncaster* v. *Doncaster* (2); *Wolley* v. *Jenkins* (3); *Taite* v. *Swinstead* (4); *In re Brown's Settlement* (5), in which Lord Justice *James* (then Vice-Chancellor) admitted the principle (6); *Sugden* on Powers (7). The rule is useful, inasmuch as these children may possibly have settled, or otherwise dealt with, their shares. There is no trust in the will for re-investment, so that a sale effects an actual conversion.

That the law as to leaseholds is the same as that of freeholds in this respect appears from *Baker* v. *White* (8), where the Master of the Rolls refers to *Stevenson* v. *Mayor of Liverpool* (9).

As to the remaining points, it is clear that a power to sell given to three persons cannot be exercised by two of them. If to *A.* and *B.*, it cannot be exercised by the survivor of *A.* and *B.* If the donees be also executors, the point is left somewhat in doubt: *Sugden* on Powers (10). In *Brassey* v. *Chalmers* (11) the question was, whether the power was given to *A.* and *B. nominatim* or as executors. Lord *Romilly*, M.R., held that it was given to them *nominatim*, but the Lords Justices reversed that and held that it was given to them *quâ* executors, and that the survivor could, with the assent of trustees appointed by the Court, make a good title: *Lane* v. *Debenham* (12); *Stroughill* v. *Anstey* (13).

The result is that Messrs. *Cooke* are strangers, and can convey no estate legal or equitable.

Kay, in reply.

(1) 2 K. & J. 709.
(2) 3 Ibid. 26, 38.
(3) 23 Beav. 53.
(4) 26 Ibid. 525.
(5) Law Rep. 10 Eq. 349.
(6) Ibid. 353.
(7) 8th Ed. p. 850.
(8) Law Rep. 20 Eq. 166, 176.
(9) Ibid. 10 Q. B. 81.
(10) 8th Ed. p. 126.
(11) 4 D. M. & G. 528.
(12) 11 Hare, 188.
(13) 1 D. M. & G. 635.

BACON, V.C.:—

Notwithstanding the learned arguments which I have heard on the subject of powers, and the great obscurity which has sometimes been occasioned by the language of testators, I come back to where we started from, namely, the words of the will, because upon them must depend the solution of the questions that have been argued, as in all the instances which have been referred to.

Let us consider the language of this will. A man who is a farmer, being possessed of property, and having two sets of children, one by a former, the other by an existing marriage, directs that the farm shall be carried on for the benefit of his wife and all his children. Then, bethinking himself of some property which will come to his earlier set of children, he desires that their shares should be brought into hotchpot, so as to form one common fund. These are his intentions, and nothing more, and then he appoints three trustees and executors, of whom his wife is one. So that it cannot be said that the objects of the testator were not entrusted to the three persons who are named in the will. That the legal estate will pass without words of conveyance, if duties connected with the estate are imposed on the trustees, is not disputed, and is not capable of being disputed. The only question is, whether they can exercise the powers which have been entrusted to them without being clothed with the legal estate. That they must have the legal estate in order to execute those powers, is the argument of the applicants on this summons, which argument the Respondents do not admit. The argument of the Respondents comes to this—what was meant was that events might arise on the happening of which the trustees might feel it desirable to call into their counsel the assistance of the children. But, in my opinion, it is not to be gathered from that, that there was meant to be any practical division of authority.

The testator says, "I am desirous." [His Lordship read the passage, and continued:—]

The argument which has been addressed to the Court on behalf of the purchaser is, that upon the death of the widow a share of the legal estate in this property vested in each of the children. But the answer to that is, that the testator has expressed his desire that upon the widow's death all his property, both real and

V.-C. B. 1877 *In re* COOKES' CONTRACT. Judgment.

personal, should be fairly and equally divided amongst all his children. Then there is not merely a hotchpot clause; but there follows that which necessarily becomes a direction for conversion. All must be turned into money in order that there may be that equal division of the "common fund" of which the testator speaks, amongst the children. The will goes on to say, "Now therefore for carrying such intention into effect I do hereby appoint my said wife and her two brothers trustees and executors." So far, in my opinion, there is no sort of doubt or question. I do not know how the duties of these trustees could be discharged except by an absolute conversion on the death of the wife. Accordingly the testator says, "I do hereby authorize and empower them to manage and conduct my affairs and business, and all matters relating to my real and personal estates . . . . for the benefit of my family in such way and manner as they in their discretion shall think fit; and for that purpose I authorize and empower them to sell and convert into money all or any part of my said real and personal estates." [His Lordship read to the end of the passage.] Then the trustees are to carry on the farm, but so as not to interfere with the widow's management during her widowhood, and subject thereto the real and personal estates, "and the proceeds thereof" are to be held in trust for all the children "in equal shares and proportions."

The fact that there is a legal estate in the trustees not being in dispute, can I doubt that the testator has given the whole of his estate to the trustees named, in order that, amongst other things, they may sell, as well as mortgage, the real estate? Many contingencies might happen, in the event of which it might be convenient or necessary to raise money. If such a course had become desirable, would it have been a breach of trust on the part of these trustees to raise money? Although there is no direct gift to the trustees, I am of opinion that an absolute interest is by the terms of the will conferred upon them and vested in them for the purposes of the will, and, when those purposes are fulfilled, for effecting a division of the property as a common fund amongst the children.

The cases which have been referred to merely go to this, that when all the trusts of an instrument have been exhausted and

satisfied, and trustees are no longer necessary, then their powers are to cease. Can that be said in this case? Is not the necessity for the interference of trustees as great and patent now as it was on the day when the testator died?

The case as presented to the Court abstains from making any statement as to the particulars of the testator's family, and what will be the probable state of that family when the trustees come to discharge their ultimate duty. But I do not desire to speculate on that. The only question now is, are they at liberty to resort to a sale, as being the only mode in which they can "fairly and equally divide the property amongst the children"?

I think the trustees can make a good title under the conditions under which they have sold; and that the purchaser is perfectly safe in taking a conveyance from them alone. It cannot be said that the purchaser has been taken by surprise. He received a plain intimation that he was not to meddle with the execution of the trusts in exercise of which the trustees undertook to sell and convey to him. The case has been learnedly argued; and after all that has been addressed to me my opinion is that these trustees have not only the power to sell, but also to convey this property without resorting to the necessity of making the beneficiaries parties to the conveyance.

Feeling, as I do, for the reasons I have endeavoured to state, no doubt about the construction, I must order the Respondent to pay the costs of the summons.

Solicitors: *Richard Dickson*, agent for *Wilkinson & Slann, Holt, Norfolk; Norris, Allens, & Carter*, agents for *E. P. Simpson, Norwich.*

V.-C. B.
1876
Nov. 24.

BARKER *v.* COX.

[1876 B. 192.]

Vendor and Purchaser—Limited Interest—Specific Performance with Abatement.

By marriage settlement real estate was limited to such uses as *A.* and *B.* (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of *B.*, in trust for her separate use, with remainder to *A.* in fee. *A.* entered into a contract to sell the property to *C.*, who had notice of the provisions of the settlement; and in the contract it was stated that *A.* would "procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." The purchase-money was paid by *C.* to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by *A.* and *B.* to *C.* was approved, but before executing it *A.* died suddenly. *B.* having after *A.'s* death refused to convey her life interest:—

Held, that *C.* was entitled to specific performance to the extent of *A.'s* reversion in fee, with compensation in respect of *B.'s* life interest, and a lien on the invested purchase-money in the hands of the trustees of the settlement.

Statement.

THIS case, which was heard on demurrer in this Court on the 17th of June, 1876, and in the Court of Appeal, as reported (1), now came on for hearing.

The facts, which were not in dispute, were as follows:—

By the settlement, dated the 25th of August, 1866, made upon the marriage of *William Sandys Cox* and the Defendant *Isabella Cox*, two houses in *Paradise Street, Birmingham*, were granted to *William Hatton* and *Osborne Reynolds* and their heirs, to such uses, upon such trusts, and in such manner in all respects as *W. S. Cox* and the Plaintiff, by any deed or deeds, should at any time or from time to time appoint; and in default of and until such appointment to the use of *Hatton* and *Reynolds* during the life of Mrs. *Cox*, upon trust to pay the rents and profits thereof to her for her sole and separate use without power of anticipation, with remainder to the use of *William S. Cox*, his heirs and assigns for ever.

In September, 1875, the Plaintiff *Barker* entered into negotiations with the testator for the purchase of the two houses in *Paradise Street*, and the price agreed upon was the sum which,

(1) 3 Ch. D. 359.

invested in Consols, would produce an income of £180 per annum (£6000 Consols).

A contract of purchase was entered into between the Plaintiff and the testator on the 25th of October, 1875, in which it was stated (par. 4) that the premises "are now settled to such uses as the vendor and *Isabella Cox* shall jointly appoint, and the vendor will procure a proper assurance to be executed by all proper parties."

An abstract of the vendor's title, including the marriage settlement, was sent to the Plaintiff's solicitor; and pending the completion of the purchase, some correspondence took place between Mr. *Cox*, the testator, and his solicitor, and other persons, as to a proposed settlement of the purchase-money so as to secure, in the event of his decease, Mrs. *Cox's* life interest therein; but the testator was at this time very ill and unable fully to attend to business, and a proposed trust deed, though prepared, was never executed by the testator during his lifetime.

The title was accepted by the Plaintiff *Barker*, and a draft conveyance was settled and approved on behalf of both parties.

On the 22nd of December, 1875, £6000 Consols were purchased by *Barker* in the names of *Hatton* and *Osborne Reynolds*, the trustees of the marriage settlement, pursuant to the agreement for sale, and a deposit which had been previously paid by *Barker* was thereupon returned to him.

On the 23rd of December, 1875, on which day the conveyance was sent by the purchaser's solicitor for execution by Mr. and Mrs. *Cox*, Mr. *Cox* died suddenly without having executed it.

By his will, dated the 3rd of February, 1875, Mr. *Cox* had bequeathed the residue of his personal estate (after giving certain legacies thereout) in trust to invest and pay the income of such investments to his wife during her life for her sole and separate use, with gifts in favour of charities after her death.

By the same will, after reciting the provisions of his marriage settlement, the testator devised and bequeathed all his real estate to trustees upon trust, during the life of his wife, to pay her the annual income to arise therefrom during her life for her sole and separate use, with trusts for sale after her death, and for the application of the proceeds.

V.-C. B. 1876 BARKER v. COX. Statement.

Actions had been commenced, 1, by *Barker* the purchaser, claiming specific performance of the contract by a conveyance of the fee simple, subject to Mrs. *Cox's* life interest, with compensation out of the testator's personal estate in respect of such life interest; 2, by Mrs. *Cox*, who being advised that she was not bound to concur in the conveyance, by her statement of claim asked the determination by the Court of the questions arising out of the contract as between herself and *Barker* the purchaser, and also as between the real and personal representatives of the testator and herself.

To the statement of claim in *Barker's* action two demurrers were filed, 1, by the real representatives of the testator; 2, by Mrs. *Cox* and the personal representatives.

To Mrs. *Cox's* statement of claim *Barker*, the purchaser, demurred.

The demurrers were heard on the 17th of June, 1876, when the Vice-Chancellor overruled the demurrers in *Cox* v. *Barker*, and directed the demurrers in *Barker* v. *Cox* (which raised the question whether the purchaser was entitled to specific performance with an abatement or compensation, or merely to such partial performance as was claimed by him without any abatement) to stand till the hearing.

The decision of the Vice-Chancellor was affirmed by the Court of Appeal (1).

The actions now came on for trial.

Argument.

Sir *H. Jackson*, Q.C., and *Chapman Barber*, for the Plaintiff, the purchaser:—

The contract being for a sale of the property in fee simple, the purchaser, who is willing to take as much as he can get, is entitled, according to the general rule, to specific performance to that extent, with compensation, by an abatement of the purchase-money, for that portion (Mrs. *Cox's* life interest) which he cannot get: *Sugden's* Vendors and Purchasers (2); *Mortlock* v. *Buller* (3); *Hill* v. *Buckley* (4); *Nelthorpe* v. *Holgate* (5); *Graham* v. *Oliver* (6).

(1) 3 Ch. D. 359.
(2) Page 305.
(3) 10 Ves. 292, 316.
(4) 17 Ves. 394, 401.
(5) 1 Coll. 203.
(6) 3 Beav. 124, 128.

The vendor's want of title to the entire interest will not be available as a defence if the purchaser is willing to take such estate as the vendor can convey—in this case the fee simple subject to Mrs. *Cox's* life interest—and the vendor must submit to an abatement of the price to be paid for the entire fee simple contracted to be sold, but not capable of being conveyed: *Wilson* v. *Williams* (1) (recognised as an authority both in *Sugden's* Vendors and Purchasers (2) and *Dart's* Vendors and Purchasers (3)); *Barnes* v. *Wood* (4); *Hooper* v. *Smart* (5); *Dart's* Vendors and Purchasers (6). The only exceptions to this general rule are, first, where the Court, looking to all the circumstances, has seen that specific (or, more properly speaking, partial) performance would inflict a great preponderance of inconvenience and hardship: *Thomas* v. *Dering* (7); secondly, when the Court is satisfied that the contract was to sell, not the fee, but only the chance or contingency of some one else conveying the fee: *Castle* v. *Wilkinson* (8). The cases in which, apart from these exceptions, specific performance with an abatement has been refused, see *Wheatley* v. *Slade* (9); *Jones* v. *Evans* (10); *Maw* v. *Topham* (11), have not been approved by Lord *St. Leonards*, see Vendors and Purchasers (12), or depend upon their own special circumstances; and *Castle* v. *Wilkinson*, which may be relied upon by the Defendants, was decided (against the purchaser) on the express ground that the vendor there did not profess to sell the fee, but only that estate which he was able to dispose of, and that the purchaser never could have believed for a moment that he could purchase the fee simple.

E. Russell Roberts, for the executors, submitted that the Plaintiff, if he was willing to take the partial interest which could be conveyed to him, was entitled to have the agreement so far specifically performed, but was not entitled to any abatement or return of the purchase-money: *Maw* v. *Topham*.

(1) 3 Jur. (N.S.) 810.
(2) Page 305.
(3) Page 1065.
(4) Law Rep. 8 Eq. 424.
(5) Ibid. 18 Eq. 683.
(6) Page 1067.
(7) 1 Keen, 729.
(8) Law Rep. 5 Ch. 534.
(9) 4 Sim. 126.
(10) 12 Jur. 664
(11) 19 Beav. 576.
(12) Pages 309, 318.

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Kay, Q.C. (*Woodroffe* with him), for the trustees of the will:—

In all the cases relied on by the Plaintiff in support of his claim for specific performance with an abatement, there has been misrepresentation or misstatement of facts on the part of the vendor. Here the state of the title was disclosed by the contract, and the purchaser received distinct notice that the vendor was not owner in fee, and that he could only convey the property with the concurrence of his wife. The statement that her execution would be procured, is at most a misrepresentation of mere intention, and, as distinguished from a misrepresentation of existin facts, does not entitle the Plaintiff to relief: *Jorden* v. *Money* (1). She cannot be compelled to convey: *Emery* v. *Wase* (2). And as the purchaser has not been in the slightest degree misled by anything appearing in the contract, but knew distinctly that he was contracting with husband and wife for the estate of the wife, and could only get what she was willing to convey, such a contract cannot be enforced either partially or wholly: *Castle* v. *Wilkinson* (3).

Rowden, and *A. T. Watson*, for other parties.

Rigby, for the Crown.

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C.:—

Upon the main question in this case I cannot say that I entertain the slightest doubt. I think that I must treat this as if the vendor were now alive. Nothing that has happened since this contract can alter the relations subsisting between the parties when the contract was entered into. The cases are all consistent. I am not disposed to think that misrepresentation is a necessary element in those cases in which the Court is called upon to do justice between the parties. The plain justice of this case does not require one word to be said about it. An owner in fee simple, subject to certain trusts in a marriage settlement which do not affect his interests unless they are put into execution, sells an estate, and sells it for a price which is fixed, the meaning of

(1) 5 H. L. C. 185. (2) 5 Ves. 846.
(3) Law Rep. 5 Ch. 534.

which was clearly understood. His wife was entitled to an estate for her separate use, and he did not mean to interfere with his wife's enjoyment of her life interest, and therefore a sum of money is to be set apart to produce an income equal to what she would receive from the rents, viz., £180 a year. Then comes the 4th clause of the contract [to which his Lordship referred]. She might die next day, and then the interest would be absolute. She might concur, and he expected she would concur. His engagement is that all necessary parties should concur; and he might safely enter into the engagement, for as there was a joint power of appointment, whether he could procure her concurrence or not, he knew that by withholding his own consent the incumbrance would never exist on the estate. What has happened is that he receives the purchase-money. The whole of it is paid to him. Every interest that he or any one succeeding to him could claim out of this estate is bought and satisfied; and the object of this suit is that those who represent him should be compelled to carry the contract into effect in its plain and material terms, or that they should forego that sum of money which has been paid, or make compensation. Cases have been referred to conveniently, but not, I think, necessarily, because the rule of the Court is plain, that if a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest, and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or if not, by compensation to be placed in the same position in which he would be entitled to stand. I cannot doubt that the claim made in this suit is upon the whole a right claim. Specific performance is asked, but that cannot be decreed. Then it is asked that it should be declared that he is entitled to compensation. That seems a matter of course upon the facts admitted and urged in this case, and that he has a lien on the sum of stock in the meantime is, I think, equally clear.

MINUTE OF DECREE:—Declaration that as between the Plaintiff, *William Barker*, and the real representatives of the testator, *William Sandys Cox*, the

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contract was binding; that the Plaintiff was entitled to have the intended purchase completed by the trustees of the settlement as to the ultimate remainder only in the property, with compensation for the life interest of Mrs. *Cox*, the testator's widow; and that he was entitled to a lien on the stock standing in the names of the trustees.

Solicitors: *Gamlen & Son*, agents for *W. Cottrell, Birmingham; Kennedy, Hughes, & Kennedy*, agents for *Palmer & Broughton, Birmingham; G. J. Brownlow*, agent for *Watson & Baxter, Lutterworth; Solicitors for the Treasury.*

V.-C. B. 1876 *Dec.* 14.

In re COMPAGNIE GÉNÉRALE DE BELLEGARDE.

CAMPBELL'S CASE.

Company—Power to borrow—Issue of Debentures at a Discount to a Director—Companies Act, 1862, *s.* 165.

Directors, with borrowing powers, issued debentures at 7½ per cent. discount. Some of the debentures having been taken by a director:—

Held, that the issue of debentures at a discount was not illegal; and that the director was not liable to the company for the difference between 92½ per cent. and par.

Statement.

ADJOURNED SUMMONS.

Among the articles of association of the *Compagnie Générale de Bellegarde, Limited*, were the following:—

"16. The directors may from time to time borrow any sum or sums of money not exceeding the sum of £200,000, and, with the sanction of the company in general meeting, may borrow such further sum or sums of money, so that the whole debt for the time being of the company in respect of borrowed capital does not exceed in amount the nominal value of the capital for the time being of the company.

"17. The repayment of any money borrowed as aforesaid, and of the interest thereon, may be secured by mortgage of all or any part of the property and effects of the company, or by bonds, debentures, promissory notes, or in such other manner as the directors may think expedient."

In the year 1872, the directors resolved to borrow £90,000 by

"mortgage obligations;" and a prospectus, of which a printed copy was exhibited by the official liquidator, but the issue of which was not regularly proved, and not admitted, contained these statements:—

"The company . . . are prepared to receive applications for 1000 Mortgage Obligation Certificates of Series A, of the value of £20 (500 francs) each, and 700 Certificates of Series B, of the value of £100 (2500 francs) each.

"The certificates will be issued at par, £5 per cent. being payable on application, £20 per cent. on allotment, and the remainder by three equal monthly instalments . . .

"The certificates will carry interest at the rate of £7 per cent. per annum." . . .

Finding that they were unable to place the debentures at par, the directors proceeded to issue bonds to the public at £92 10*s.* per cent. Of the bonds so issued, several of the directors took some; and, among others, a director named *William Orr Campbell*, took one set of bonds of the nominal value of £1320, for which he paid £1221, being at the rate of 92½ per cent., and also another set of the nominal value of £680, for which he paid £529, being at the same rate.

In the company's books an account was drawn out between the company and Mr. *Campbell*, in which he was credited with payment of the £1320 in full, and debited with the sum of £99 under the entry "Commission on mortgage obligations," in respect of one purchase; and in respect of the other was credited with payment of the £680 in full, and debited with £51 on the other side of the account, under an entry in similar terms.

The company having been on the 15th of January, 1876, ordered to be wound up, the official liquidator now took out a summons that Mr. *Campbell* might be ordered to pay over to him these two sums of £99 and £51.

The official liquidator's affidavit in support stated the effect of the entries in the books to be, that Mr. *Campbell* "received or was allowed" the two sums of £99 and £51 "by way of commission or discount on the mortgage obligation certificates issued to him."

In answer, it was stated that "the bonds were all actually issued

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at £92 10*s.* per cent. as an inducement to the public to take them."

Statement.

In reply, the official liquidator said it appeared from the books that bonds to the value of £100 were issued to Messrs. *Stewart*, and £240 to one *Salisbury Ball*, "without any such allowance being made."

It turned out that these were the only instances in which bonds had been issued on other terms than at $7\frac{1}{2}$ discount.

The case was taken as representative of several others.

Argument.

Sir *H. Jackson*, Q.C., and *Terrell*, for the official liquidator:—

A director is not allowed to make or retain any commission out of the funds of a company: *Stringer's Case* (1); *Companies Act*, 1862, s. 165.

Without relying on the 154th section of the Act, which makes the books *primâ facie* evidence of the truth of all matters purporting to be therein recorded, we say that whether these sums be called discount or commission makes no difference, inasmuch as the books are evidence against the director.

The company, after having published the prospectus, had no power to issue debentures except at par. Even if they had power to issue debentures at a discount to the public, it was illegal to issue them at a discount to a director: *Imperial Mercantile Credit Association* v. *Coleman* (2).

Assuming that the company is right in claiming these sums from Mr. *Campbell*, there is no set-off of these sums against any debt of the company to Mr. *Campbell*. These sums are moneys of the company in Mr. *Campbell's* hands. He is not a debtor in respect of them.

By the 98th section there is imposed upon the assets of the company, wherever they may be at the date of the winding-up, a trust to be applied in discharge of the liabilities of the company: *per* Lord *Cairns*, L.C., in *Delhi Bank Case* (3); and see *Parlby's Case* (4). In *Gloag's Case* (5), Lord *Westbury* held that

(1) Law Rep. 4 Ch. 475.
(2) Ibid. 6 H. L. 189.
(3) Alb. Arb. 15 Sol. J. 923, 924.
(4) Reilly's Alb. Arb. Cas. 48.
(5) Eur. Arb. Cas., Law Times Rep. 82; 17 Sol. J. 534.

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CAMPBELL'S CASE.

Argument.

the liquidator was entitled to sue at once for a sum advanced by the insurance company to one of the policy-holders.

The 10th section of the *Judicature Act*, 1875, by importing into winding-up proceedings the rules in bankruptcy, for the first time admits into winding-up proceedings a mutual credit clause (1). But a mutual credit and debt clause will not apply to a case like this, where, according to Lord *Cairns* and Lord *Westbury*, the money is not a debt, but assets of the company outstanding.

Kay, Q.C., and *W. Renshaw*, for Mr. *Campbell*:—

The articles empowered the directors to borrow in certain ways, "or in such other manner as the directors may think expedient;" and that directors may, by resolution properly carried, issue debentures at less than par, appears from *In re Anglo-Danubian Steam Navigation and Colliery Company* (2) and *In re Regent's Canal Ironworks Company* (3).

Why should all the world be at liberty to take these debentures, except the directors? The whole issue was taken up at 92½, except in the two instances referred to by the official liquidator.

Then as to the set-off. Putting it at the highest, Mr. *Campbell* is liable only for moneys had and received. But in this instance no money was received by Mr. *Campbell*. The books, no doubt, debit him with £99 and £51—that is, they credit him with £100 per cent., and debit him with 7½ per cent., but in truth he paid only 92½ per cent., like everybody else. That is a mere matter of book-keeping.

The *dicta* of Judges in cases under statutory arbitration are not authorities. But taking the judgments as reported, all Lord *Cairns* and Lord *Westbury* meant was, that you cannot set off a debt payable at a future day against a debt presently payable.

Sir *H. Jackson*, in reply.

Judgment.

BACON, V.C.:—

This case, in one point of view, is of importance, because it has been argued as if it fell within the principle which the Courts

(1) *Bankruptcy Act*, 1869, s. 39. (2) Law Rep. 20 Eq. 339.
(3) 3 Ch. D. 43.

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CAMPBELL'S CASE.

Judgment.

of Equity have always adhered to, not to permit an agent, or director, or any person in a fiduciary character, and having power and influence in the concern, to make a profit by his dealings with the concern.

But the fact that any profit was made I find to be wholly wanting in this case. There was no profit. The directors publish a prospectus, in which they say, "We are going to issue bonds at par." It is all very well to say so, but when they come to issue these bonds, people will not take them at par. What are they to do? They find they cannot place them at par, and they sell them on the best terms they can, and, except in the two particular cases mentioned, they issue all these debentures on the same terms as those on which the debentures taken by Mr. *Campbell* were issued. What is there unlawful in that? What is there to prevent the directors buying on the same terms as other people? The case, when examined, does not fall within the principle upon which the application is made. The section of the *Companies Act* which has been referred to is really wide of the present case. That section compels restitution from directors when they shall have misapplied or retained in their own hands, or become liable or accountable for, any moneys of the company. But, in this instance, when did the difference between par and 92½ per cent. ever become the money of the company? It was money which they never received, and which was never theirs. The section proceeds, "or has been guilty of any misfeasance or breach of trust in relation to the company." What misfeasance or breach of trust was Mr. *Campbell* guilty of in advancing to the company, on exactly the same terms as everybody else, money which they were in want of? It was not money for which he had become liable or accountable. The company's books have been kept, as it appears to me, in the proper and regular way. It is necessary for book-keeping purposes that there should be entered on the credit side of the ledger the aggregate amount of all the debentures representing the debt due from the company. Then the company debit the amount unpaid, and whether that amount be called commission or discount, the true nature of the transaction cannot be obscured. The directors did that which it was lawful for them to do—they issued debentures at a certain discount. Mr. *Campbell* took them

as other people took them, and paid his money for them. He derived no sort of profit from them; the advantage, if any, was all on the side of the company.

Something has been said about the conduct of the official liquidator. Mr. *Campbell*, in his affidavit, states this fact, which is uncontradicted, and not capable of being contradicted now that it appears that these debentures were issued on the same terms to everybody, except in the two instances mentioned, and then the official liquidator—not well advised, I think—says, "They were not issued on the same terms to all, for there are two instances in which they were issued on different terms." There is nothing of any real weight in this, and the official liquidator was, I think, ill advised in bringing this forward to justify his original statement, that Mr. *Campbell* had derived a benefit from the transaction, which was inconsistent with his duty to the company as a director. In my opinion there is no ground whatever for the suggestion.

It is not necessary that I should say anything about the set-off; but I have no doubt that there is a set-off in this case. Sir *Henry Jackson* reminds me that by the section in the *Judicature Act* of 1875 to which he referred, the rules of bankruptcy for the time being are introduced into winding-up proceedings, and although the Companies Acts of 1862 and 1867 contain no section about mutual debts and credits, the mutual credits section of the *Bankruptcy Act*, 1869 (1), is now, by the 10th section of the *Judicature Act* of 1875, made applicable in the winding-up of a company. But that consideration forms no ingredient in my judgment.

The summons must be dismissed with costs, to be paid by the official liquidator; the official liquidator to have his costs out of the estate.

Solicitors: *Elmslie, Forsyth, & Sedgwick; Lawrance, Plews, & Baker.*

(1) Section 39.

V.-C. H.
1876
Dec. 14.

DEAR *v.* SWORDER.
SWORDER *v.* DEAR.

[1876 D. 81.]

Pleading—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Counter-claim—Rules of Court*, 1875, *Order* XVI., *rr.* 17, 18; *Order* XXII., *rr.* 5, 6, 10.

First mortgagee being sole Defendant to an action by second mortgagees for an account of what was due to them respectively, and to have a contract for sale entered into by the first mortgagee completed, and the sale moneys applied accordingly, made the purchaser co-Defendant with the Plaintiffs to a counter-claim for specific performance by the purchaser with the concurrence of the Plaintiffs, alleging that their concurrence was a term of the contract, and that the purchaser refused to complete without it. The defence and counter-claim having been served on the purchaser under Order XXII, rules 5, 6, he moved under Order XXII., rule 9, to have so much of the counter-claim as affected him excluded :—

Held, that, there being a question between the Defendant and the Plaintiffs "along with" the purchaser which the Defendant was entitled to raise by cross action, the purchaser was properly made a Defendant to the counter-claim, and the motion refused with costs accordingly.

Statement.

MOTION on behalf of a third person made a co-Defendant by counter-claim to have so much of the counter-claim as affected him excluded.

The action was brought by second mortgagees against the representative of the first mortgagee. The Plaintiffs delivered a statement of claim in which they stated a mortgage of certain freehold and leasehold hereditaments in the town of *Hertford* made by one *George Dear* to one *John Smitheman* by indenture dated the 7th of December, 1859, in order to secure advances to the amount of £1000 and interest, and with a power of sale, which mortgage was afterwards transferred by *Smitheman* to *Thomas Sworder;* a mortgage by *George Dear* of his equity of redemption in the same hereditaments to the Plaintiffs; that *Sworder*, on the 5th of October, 1874, in exercise of his power, had contracted to sell the mortgaged hereditaments to *Daniel Henry Redhead*, had received part of the purchase-money, that *Redhead* had been let into possession, but that the balance of the purchase-money had not yet been paid, nor had the sale been

completed; that *Sworder* had died leaving the Defendant, *Frances Jane Sworder*, his sole devisee and executrix; and that the balance of the purchase-money, after payment thereout of what was claimed by the Defendant, would not be sufficient to satisfy the sums due to the Plaintiffs on their mortgage. The Plaintiffs then claimed an account of what was due to the Defendant on the first mortgage, an account of what was due to the Plaintiffs themselves on their second mortgage, that the sale might be completed, and that the Defendant might take proper steps for enforcing completion and obtaining payment of the balance of the purchase-money; and that the Defendant might be declared a trustee of the unpaid purchase-money, and that the trusts upon which the same were held might be carried into execution under the direction of the Court, and the balance of the purchase-money applied in payment of what should be found due to the Defendant, and the residue thereof towards satisfaction of what should be found due from the Plaintiffs.

The Defendant, *Frances Jane Sworder*, then delivered a defence and counter-claim, adding, under Rules of Court, 1875, Order XXII., rule 5, the name of *Redhead* as a co-Defendant with the Plaintiffs to her counter-claim, and serving him, under rule 6, with a copy of the defence and counter-claim. By the defence she stated that the contract between *Thomas Sworder* and *Redhead* was not correctly stated, and by way of counter-claim she said that the contract with *Redhead* was made by *Thomas Sworder* not merely in exercise of his power of sale, but as solicitor of and agent for the Plaintiffs, and with their knowledge and approval; that the price was £1400, of which £100 was paid on the signing of the contract; and that it was agreed between the Plaintiffs, *Sworder*, and *Redhead*, that *Redhead* should at once be let into possession and should pay interest on the unpaid balance of the purchase-money, that he should pay a further sum of £100 on completion, and that upon completion the property should be conveyed to him free from incumbrances, and he should thereupon mortgage it to *Sworder* to secure the balance of £1200, which was not to be paid, but to be left on mortgage, and that *Sworder* should stand possessed of so much of the £1200 as represented what was due to him, for his own benefit, and of the residue for the benefit of the Plaintiffs;

V.-C. H. 1876 DEAR v. SWORDER. SWORDER v. DEAR. Statement.

that after the death of *Sworder* the Plaintiffs affected to repudiate this arrangement, and declined to join in any conveyance to *Redhead*, whilst he insisted on and still required their concurrence in a conveyance to him upon completion; and that it was under these circumstances that the sale had never been completed. The Defendant then claimed that *Redhead* might be ordered specifically to perform the contract, and that the Plaintiffs might be ordered to execute and concur in all acts and assurances necessary to carry the contract into effect; that in the event of specific performance not being decreed, *Redhead* might be ordered to deliver up possession and charged with an occupation rental; and that an account might be taken of what was owing on the first mortgage, and payment of the amount found due ordered against the Plaintiffs; and in default that the Plaintiffs might be foreclosed, or that the premises might be sold and the Defendant paid out of the proceeds.

The Plaintiffs then delivered a reply, in which they denied being parties to the contract, but they desired that the sale to *Redhead* should, and submitted that it ought to be completed.

A motion was now made on behalf of *Redhead* under Order XXII., rule 9, that so much of the counter-claim as affected him might be excluded or struck out.

Argument.

Dickinson, Q.C., and *Woodhouse*, for Mr. *Redhead*, in support of the motion:—

This is not a counter-claim by a Defendant against a Plaintiff within the first branch of sub-sect. 3 of the 24th section of the *Judicature Act*, 1873, and Order XIX., rule 3; nor is it "relief" claimed against a third person under the second branch of that section, for the Defendant has not taken the steps by service of notice and otherwise pointed out therein, and in Order XVI., rules 17 and 18, which are applicable thereto. Nor is this the case of a counter-claim under Order XXII., rules 5 and 6, for those rules only apply to cases where questions arise between the Defendant and the Plaintiff "along with any other person." And then the questions must be such as could be enforced by the same Defendant in an independent suit or cross-action. Moreover, it is essential to the validity of all counter-claims against third

persons under sect. 24, sub-sect. 3 (whereby counter-claims were created), that the relief sought thereby should be "relating to or connected with the original subject-matter of the cause," and such as "might properly have been granted against such person if he had been made a Defendant to a cause duly instituted by the same Defendant for a like purpose." Now, the present action is a redemption suit by the second mortgagee against the first mortgagee for accounts of purchase-moneys when received, with which *Redhead*, the purchaser, has nothing whatever to do; while the counter-claim is for specific performance of a contract for sale between the Defendant and *Redhead*. The relief sought by the action and counter-claim is, therefore, entirely different, which is fatal to the counter-claim: *Padwick* v. *Scott* (1); *Treleven* v. *Bray* (2). And, moreover, as the only proper parties to an action for specific performance are the parties to the contract, the Plaintiffs, who were no parties to the contract, should not be parties to the counter-claim, which ought to have been by an independent action, in which, under Order XVII., rule 1, different causes might, if necessary, be united. At any rate, the Defendant might have obtained leave to give notice under Order XVI., rules 17 and 18; or, being an executor, might have proceeded under Order XVII., rule 5. This is, in fact, not a counter-claim at all, and should be excluded.

Eddis, Q.C., and *Heath*, for the original Defendant:—

This is a *bonâ fide* adoption of the new practice introduced by the *Judicature Act*, 1873, s. 24, sub-s. 3, in order to save the expense of another trial. There are two alternative courses pointed out by the Rules and Orders, that under Order XXII., rules 5 and 6, and that under Order XVI., rule 18; and it is under and in strict accordance with the former and not under the latter (for which only leave is requisite) that the Defendant is proceeding. It was a term of the contract between the first mortgagee and *Redhead* that the Plaintiffs should concur in the sale; and *Redhead* requires their concurrence, and we cannot complete without it. Until we complete we cannot account for the purchase-money, and we are bound to enforce specific performance. There is, therefore, a

(1) 2 Ch. D. 736, 742. (2) 1 Ch. D. 176.

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question between us and the Plaintiffs, "along with" another person, *i.e.*, *Redhead*, which we could enforce by cross-action within the terms of Order XXII., rule 5; and the relief we ask by our counter-claim is "relating to or connected with the original subject of the cause," within the terms of sect. 24, sub-sect. 3. We ought not to be compelled to try the questions between us twice over, and the Plaintiffs themselves say that it is essential for their interests that the contract for sale should be carried into effect. The authorities all bear out this view: *Swansea Shipping Company* v. *Duncan* (1); *Bower* v. *Hartley* (2); *Padwick* v. *Scott* (3); *Ex parte Smith* (4). And though there are cases in which the other alternative form of procedure, viz., that under Order XVI., rules 17 and 18, has been adopted, the principle is equally applicable.

Yate Lee, for the Plaintiffs, did not object to the joinder of *Redhead* as a Defendant.

Dickinson, in reply.

Judgment.

HALL, V.C.:—

This is an application under Order XXII., rule 9, by Mr. *Redhead*, a person who has been made a Defendant to this action by a counter-claim, asking the Court to strike out the counter-claim as against him, on the ground that the question between him and the original Defendant ought to be disposed of in an independent action. The position of the parties is this: The Plaintiffs are second mortgagees; the original Defendant, *Frances Jane Sworder*, is the representative of the first mortgagee. The first mortgagee has contracted to sell the property under his power, but the sale is not yet completed. Therefore, if the contract is carried into effect, the relief granted will be in respect of the proceeds of the sale. The case brought forward by the representative of the first mortgagee is this: She says: It is true that the first mortgagee agreed to sell; the contract with the purchaser, however, was not entered into by him alone, but by him and the Plaintiffs,

(1) 1 Q. B. D. 644, 649.
(2) Ibid. 652.
(3) 2 Ch. D. 736, 742.
(4) Ibid. 51.

through him as their agent, under certain arrangements as to the part payment and securing the remainder of the purchase-money. The purchaser maintains that the Plaintiffs ought to concur in the conveyance to him, and refuses to complete without their concurrence. As to this, therefore, the original Defendant is at one with the purchaser, and she is in this position, that she cannot complete the contract with the purchaser without the concurrence of the Plaintiffs, and she insists that they are bound to concur. She says, "You are seeking to redeem me, and to take an account including the purchase-moneys, but I cannot get the contract completed without you, and I require you to concur, as the purchaser insists upon it."

The matter is thus at a dead lock until the dispute between the Plaintiffs, the Defendant, and the purchaser is decided, and the purchaser insisting on the concurrence of the Plaintiffs, the original Defendant seeks to have it determined whether the Plaintiffs shall concur or not. The question is one in which the purchaser is materially interested, and in which he takes the same view as the Defendant. Can that question be dealt with in this action, and is or is not the purchaser a proper party as a Defendant to the determination of it? It is for this purpose that the original Defendant, by way of counter-claim, bringing the purchaser before the Court, seeks to compel him specifically to perform the contract, and at the same time seeks to have it determined whether the contract is to be completed without the concurrence of the Plaintiffs. That being so, I must look to the Act of Parliament to see whether such a Defendant is entitled to say that the action shall not proceed in the absence of such a purchaser.

It is said that sect. 24, sub-sect. 3, of the Act of 1873 does not apply to a case like this. That section empowers the Court to grant to any Defendant "all such relief against any Plaintiff as such Defendant shall have properly claimed by his pleading," and as the Court "might have granted in any suit instituted for that purpose by the same Defendant against the same Plaintiff; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed"—that is, properly claimed by his pleading—"against any other person,

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whether already a party to the same cause or not, who shall have been duly served with notice in writing of such claim, pursuant to any rule of Court or any order of the Court as might properly have been granted against such person if he had been made a Defendant to a cause duly instituted by the same Defendant for the like purpose." Here the original Defendant contracted to sell to the purchaser, and was clearly entitled to institute a suit against him to enforce the contract. The 5th rule of Order XXII. is as follows: "Where a Defendant by his defence sets up any counter-claim which raises questions between himself and the Plaintiff along with any other person or persons." The counter-claim here sets up that the Plaintiffs are not entitled to any relief except upon the terms of carrying into effect the contract entered into and which they agreed with the purchaser to join in carrying into effect. It raises a question between the Defendant "along with" some other person, *i.e.*, the purchaser, who insists upon having the concurrence of the Plaintiffs. The rule then proceeds: "He shall add to the title of his defence a further title similar to the title in a statement of complaint setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver," and so forth. Suppose instead of a counter-claim there had been a cross-action, such cross-action would have been by the Defendant, as vendor, against the purchaser and the Plaintiffs to enforce specific performance of the contract.

It is provided by rule 9 of Order XXII. that if the Plaintiff, or any other person named as a party to a counter-claim, contends that the claim raised ought to be disposed of in an independent action, he may apply to have it excluded. It appears to me that it is not necessary for the purpose of doing justice to the Defendant *Redhead*, that I should, acting on that rule, exclude the counter-claim. On the contrary, I think that *Redhead* should remain a Defendant, and that the whole matter can very well and should be determined, he being retained a Defendant. I must, therefore, refuse this application with costs.

Solicitors: *Hatchett Jones; Wansey & Bowen; Hawks, Willmott, & Stokes*, agents for *Longmore & Sworder, Hertford.*

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Marriage Settlement by Widower and Widow — Limitation in Favour of Widower's Son—Construction—Son a Volunteer—Agreement for Sale by Widower—Specific Performance.

Under a marriage settlement the son by a former marriage of the intended husband took an interest in property brought into settlement by the husband :—

Held, that the son was a volunteer, and that to the extent of his interest the settlement was void as against a subsequent purchaser from the husband.

Clarke v. *Wright* (1) commented upon.

THIS action was by *Margaret Price* for specific performance of a contract dated the 16th of November, 1874, as follows :— Statement.

"I, *Thomas Jenkins*, of *Pant*, agree to sell that piece of land and the buildings on it between the *Bruce Hotel* and the road that leads to the *B. & M. Ry. Station*, measuring in *Victoria Street* about 48 feet frontage, and in the said new road about 36 feet more or less, to Mrs. *Margaret Price*, of the *Bruce Hotel*, for the sum of two hundred pounds, and to give her the lease of the same for the remaining period of 99 years, in full consideration of the same. "*Thos. Jenkins.*"

"I accept the same agreement. "*Margaret Price.*"

In the first instance *Thomas Jenkins* was the only Defendant, but it appeared that his son *Thomas Jenkins* the younger claimed, adversely to his father, an interest in the property, and he was accordingly, by the direction of the Court, made a Defendant.

Thomas Jenkins the younger was a son of the original Defendant by his first marriage. The property the subject of the contract belonged to *Thomas Jenkins* the father for a term of years at the time of his second marriage, which took place in March, 1875, and was settled by him on that occasion upon trust for himself and his intended wife during their joint lives and for the survivor for life, and after the death of the survivor for his son, *Thomas Jenkins*, absolutely. The intended wife's property was settled as to

(1) 6 H. & N. 849.

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part for her separate use, and as to the rest upon such trusts as she should appoint, and in default of appointment, for her for life for her separate use, and after her decease in trust for all and every her children then living or thereafter to be born who being a son should attain twenty one, or a daughter should attain that age or marry under it, equally as tenants in common.

Thomas Jenkins the father also raised a defence which, in the opinion of the Court, was not established, that the contract was void by reason of his having been drunk when he signed it. He stated that the settlement on his son was consented to by his second wife, but was not made at her instance.

Argument.

Dickinson, Q.C., and *Freeling*, for the Plaintiff, after referring to the case of *Heap* v. *Tonge* (1), and particularly to the judgment of Mr. Justice *Williams* in *Clarke* v. *Wright* (2), *Dart's* Vendors and Purchasers (3), and *Sugden's* Vendors and Purchasers (4), submitted that the sole consideration for the settlement was marriage, and that the son was a mere volunteer whose interest was overridden by the subsequent sale.

Morgan, Q.C., and *Maclean*, for the Defendants:—

The limitation in the settlement in favour of the son was not voluntary. The bargain was cemented by the marriage, and the son cannot be considered as a mere volunteer. The observations in *Clarke* v. *Wright* apply to this case, which is, however, a much stronger one than that, as the child here is legitimate. The Court cannot split the consideration for the settlement. *Newstead* v. *Searles* (5) governs this case, and it ought to be followed.

[They also referred to *Hewison* v. *Negus* (6); *Nelthorpe* v. *Holgate* (7); *Ford* v. *Stuart* (8); *Clayton* v. *Earl of Winton* (9); *Jthell* v. *Beane* (10); *Pulvertoft* v. *Pulvertoft* (11).]

Judgment.

HALL, V.C., after commenting upon the evidence on behalf of

(1) 9 Hare, 90, 104.
(2) 6 H. & N. 849.
(3) 5th Ed. vol. ii. ch. 15, s. 5, p. 976; ch. 18, ss. 9, 10, pp. 1114, 1115.
(4) 13th Ed. pp. ~~716, 717~~.
(5) 1 Atk. 265.
(6) 16 Beav. 594.
(7) 1 Coll. 203.
(8) 15 Beav. 493.
(9) 3 Madd. 302, n.
(10) 1 Ves. Sen. 215.
(11) 18 Ves. 84.

Thomas Jenkins the elder that he was drunk at the time when the contract was entered into, and the argument that the contract was, on that ground, not one that could be enforced by the Plaintiff, and stating that the evidence shewed that he was not drunk, and that it was clear that he entered into the contract unconditionally, and referring to an agreement by counsel that the question on the settlement should be now decided, continued :—

It is unnecessary to determine whether, in the absence of such agreement, this is a contract of which the Court would decree specific performance, leaving it an open question, to be determined hereafter in a litigation between the son and the purchaser, whether or not the settlement was effectual as against the latter; but the parties having agreed to have the question of the validity of the settlement, as against the purchaser, disposed of in this litigation, in my opinion the Plaintiff would have been entitled to such a decree. It was argued that the Court would not decree that to be done which involved a sanction or a recognition of that which was a fraud or attempted fraud upon the persons interested under the settlement. But such contention would not, I think, be available. *Thomas Jenkins* the elder having contracted to sell the residue of the whole term in the leasehold property, it was not open to him to say afterwards that he had not got it and would not give it to the purchaser, when she said she would take, and did not object to his title.

I now come to consider the validity of the settlement, as against the purchaser. The case of *Clarke* v. *Wright* (1) has been relied upon by the Defendant the son. That is a case which I should only follow in a similar one—I do not mean a case in which the settlement was of the same description of property, and the limitations and terms of it were framed in precisely the same way, but a case to which the principles, to be collected from the judgment in that case, and, as I consider, laid down by the Court of Exchequer Chamber, were properly applicable. But I must observe that it is very difficult to apply the principles of decision of that case to any other case not exactly similar in its circumstances; by reason of the grounds of the decision being different in the Court of

(1) 6 H. & N. 849.

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Exchequer, where the case was first determined by four Judges, from those in the Court of Appeal, and the grounds of the decision in that Court not only differing, but differing as regards the Judges who agreed with the decision of the Court of Exchequer.

The authorities which have been referred to may, I think, for the present purpose, be considered as commencing with the case of *Newstead* v. *Searles*, as reported by Mr. *West* (1). I refer to that report because facts are there stated from Lord *Hardwicke's* own notes and the Registrar's book which are not to be found in Mr. *Atkyns'* report. The argument of the Attorney-General for the Plaintiffs, the children of a first marriage, was, to a great extent, founded on this—that they were the primary objects of the articles, and were to be preferred, or at least to take equally with, the children of the second marriage. Lord *Hardwicke* in his judgment referred to the position of a widow about to contract a second marriage, stating that unless the articles were binding it would become impossible for a widow on her second marriage to make any certain provision for issue of a former marriage, and the second husband might then contrive to defeat the provision made for those children. In the latter part of the judgment, after going through the case, he said: "Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statute of the 13th and 14th of *Elizabeth* that makes conveyances fraudulent, are voluntary conveyances, made against purchasers for valuable consideration or *boná fide* creditors; but it would be difficult to shew that such a limitation as the present case has been held fraudulent, and void against subsequent purchasers or creditors." He then referred to the case of *Jenkins* v. *Keymis* (2), stated in the note of the judgment in *West's* report, and also in *Atkyns*, and said: "The present is a stronger case, for here are reciprocal considerations both on the part of the husband and the wife by the provision under the articles for the children of the second marriage."

It may be useful to refer to *Jenkins* v. *Keymis*. It was a case of this kind: Sir *Nicholas Keymis* was tenant for life, and his son *Charles* was tenant in tail. Then, "in consideration of a mar-

(1) Pages 287, 292. (2) 1 Lev. 150.

riage to be had between his son and *Blanch Mansell* and £2500 portion, he levied a fine to the use of Sir *Nicholas Keymis* for life, remainder to *Charles* and *Blanch* for their lives, remainder to the heirs of the body of *Charles* of *Blanch* begotten, remainder to the heirs of the body of *Charles*, with power to Sir *Nicholas Keymis* to charge the premises with £2500." So that *Charles* acquired by that settlement limitations in favour of his issue, not only of the intended marriage, but generally in favour of the issue of any marriage. The £2500, which was to be the daughter-in-law's fortune, was in consideration of a marriage to be had between Sir *Nicholas's* son and *Blanch;* but it does not appear whether the portion was paid to the son, or whether it was paid to the son and the father, or to the father alone. I am not at all sure that it did not go to the father alone; but, at all events, the lady's fortune of £2500 was paid on the occasion of the marriage. The son was party to the arrangement with the father, and that money being paid, there were limitations made in favour of the children of the son not confined to the issue of that particular marriage. Then a mortgage was made by Sir *Nicholas* and *Charles;* and the question was, whether or not that was valid, or whether it defeated the limitations to the issue of the second marriage. It was alleged that "the consideration of the marriage of *Blanch* and the £2500 paid with her did not extend to the Defendant, being issue by the second *venter*, and so the estate in remainder whereby he claimed was voluntary." That was the ground of the contention, but Lord Keeper *Bridgman* "declared that the consideration of £2500 paid on the first marriage should extend to the issue by the second *venter*." It really amounted to this: that it does not appear how the money was paid, or to whom it was paid, but the money was paid, and that was the consideration for the settlement being made in that form, viz., in consideration of £2500 coming from the lady, a settlement was made which included the children of the son by a second marriage. There was, therefore, a money consideration which could not be severed and separated. That consideration ran through the whole of the settlement and the whole of the limitations. Under those circumstances the case is one of that class in which we find a consideration paid for the particular settlement, and we cannot defeat

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the settlement and say it applied only to the one set of limitations down to and including merely the issue of that marriage, but it embraced the whole. It was a case of bargain between the father and son. The father had to concur in the re-settlement with his son; and the son, no doubt, may be taken to have stipulated with his father in concurring in re-settling the estate and barring the entail by the fine for a re-settlement embracing issue of any marriage. They probably changed, in some respects, the course of settlement which existed previously. It does not appear, however, what the exact ulterior limitations were; but, probably, they cut off some remainders. It was a matter of contract between father and son for that particular settlement, as well as a contract arising from, and supported by, the consideration of the portion coming from the wife. It is important to refer to that, because that case was the groundwork of Lord *Hardwicke's* decision in *Newstead* v. *Searles* (1), who said that that was a stronger case because of the reciprocal considerations both on the part of the husband and wife by the provision under the articles for the children of the second marriage. Those reciprocal considerations were these: that the particular property which was dealt with in that litigation was settled by one limitation in favour of the issue of the two marriages. That being so, it came within the class of cases in which limitations in favour of strangers are mixed up with limitations in favour of persons who are not strangers; so that they are all to take together, or in a certain order of limitation, and such taking necessitates the Court holding to be valid the limitations in favour of those who are not within the consideration. The Court in such cases holds the whole to be effectual in order that it may give effect to that which, being within the consideration, must have effect given to it.

The case of *Newstead* v. *Searles* is really no authority for the general proposition that a settlement made on the occasion of a second marriage in favour of issue of a former marriage is an exception to the ordinary rule that limitations in favour of strangers or persons not within the consideration of marriage are, under the statute of *Elizabeth*, defeated by alienation for valuable consideration.

(1) West's Rep. 287.

Clayton v. *Earl of Winton* (1), which is stated in a note in the first volume of *Sugden's* Vendors and Purchasers (2), was relied on. In that case it was necessary to support the limitations in favour of those not within the marriage consideration, in order that the limitations in favour of those who were within the marriage consideration might take effect.

The case of *Jthell* v. *Beane* (3), also before Lord *Hardwicke*, was cited by Mr. *Maclean*. In that case there are some observations of the Lord Chancellor which were said to have a general bearing upon the present case. He said at the close of his judgment: "This is different from the case of a bond by a father, for it is a contract between the husband and the second wife and her friends, and so far like *Osgood* v. *Strode* (4), it being provided in the agreement that the son by the former wife should come in for a share, which is a bargain and for valuable consideration, for had it not been for this provision the husband would not agree to let it go so far as £400." The view that was taken in that case was that it was a bargain. Then he said: "This often happens on the marriage of a widow who contracts on a second marriage to make a provision out of her own estate after her death and the death of her second husband, for her children by a former; which may be said to be voluntary, yet is reasonable, prudent, and natural, several of which have been supported in this Court as provisions for the children by the first marriage for valuable consideration. If the husband in such cases dies in life of the wife, who dies indebted, the Court would not suffer her creditors to come against the children of the first marriage, for whom she had made this provision, because it was voluntary." There the case supposed is that of a widow about to marry stipulating with her intended husband that, in favour of the children of her former marriage, some portion of her property should be settled in a particular way. If there were such a bargain, I can understand, and do not dispute that it must have effect given to it, the question in these cases being, was there a bargain, according to the true construction of the particular instrument, that the property should be settled? In that case the observations are only applicable to the pro-

6 Ch D 152.

(1) 3 Madd. 302, n.
(2) Page 716.
(3) 1 Ves. Sen. 215.
(4) 2 P. Wms. 245.

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perty of the wife herself, that she stipulated that some portion of her property which would otherwise come under the control of the husband, and in which he might have an interest of his own or some portion of it, should be settled in a particular way. The observations have no application whatever to the case of the other party to the contract making a settlement of his own property, and it not being a settlement made of the property of the wife. That brings me to the case before the Court of Exchequer, and afterwards before the Court of Exchequer Chamber, of *Dickenson* v. *Wright* (1), and *Clarke* v. *Wright* (2). In the Court of Exchequer the judgment was delivered by Baron *Channell*. The view he took of it was this: First, he referred to the recital, "that it was agreed upon the treaty of the marriage that the property should be settled as therein contained. It is not stated by whom; on this agreement, it was proposed that the remainder should be limited to the Plaintiff. It may have been that *Doncaster*, the intended husband, took a strong interest in the welfare of this child, who was then very young. It may have been that he believed in the existence of a moral obligation upon the part of his intended wife to provide for it, and that he insisted upon the provision as a condition of his marrying her. An honest and upright man, under such circumstances, might well have done so. For aught we know he may have refused to marry her at all unless this provision was made, and it seems impossible for us to say conclusively, as a matter of law, that this limitation could not be involved in the consideration of the marriage: see *Kekewich* v. *Manning* (3). A case of *Johnson* v. *Legard* (4) was much pressed upon us." Then he referred to that which is the common and ordinary case of a limitation in favour of third parties, and said: "On the other hand, in the case of *Clayton* v. *Earl of Winton* (5), a limitation in a marriage settlement to the children of a possible second marriage was held good under the same circumstances. It may be difficult to see how the children of another marriage, to take place after the death of the wife of the present intended marriage, are more within the consideration of marriage than the living brothers of the husband;

(1) 5 H. & N. 401.
(2) 6 Ibid. 849.
(3) 1 D. M. & G. 176.
(4) 3 Madd. 283.
(5) 3 Madd. 302, n.

but the truth is that, when Courts of Law or Equity once depart from the plain and obvious construction of an Act of Parliament, there is nothing to guide or direct them, and it is not surprising that inconsistencies are to be found in their decisions. We have not been referred to any authority bearing directly upon the matter in question, and we cannot say that, upon the evidence at the trial, we are bound absolutely and conclusively, and as mere matter of law, to decide that the limitation in question is void against the Plaintiff. We would act upon any decided case, but we do not feel inclined to put a construction upon this statute which its words do not authorize, beyond what the Courts of Law and Equity have already laid down."

In the earlier part of the judgment, Baron *Channell* referred to the case of *Newstead* v. *Searles* (1), and said that it was "a direct authority, that a settlement by a widow, about to marry, upon her children by a former marriage, is good against a subsequent mortgagee." He looked upon that as a clear authority in favour of the general proposition that that was an exception from the ordinary rule. Having referred to *Clayton* v. *Earl of Winton* (2), he seemed to have considered, having regard to those authorities, that there were such exceptions, and that this might be one; and he approved of the view that had been taken generally by the Courts as to the application of the Statute of *Elizabeth* to purchasers taking with notice. He was influenced by, and determined the case upon the application of the cases of *Newstead* v. *Searles* and *Clayton* v. *Earl of Winton* to that particular case—also being greatly influenced by the moral consideration as to the propriety of providing for the children. When the case came before the Court of Exchequer Chamber there were very elaborate arguments and judgments. The Lord Chief Justice began by saying (3), "I am of opinion that the decision of the Court of Exchequer in this case should be affirmed, but I am unable to concur in the reasons on which the decision of that Court appears to have proceeded." Then he went through those reasons, and said that they would not do at all, but said, "Nevertheless I am of opinion that this limitation may be upheld." He referred to

(1) West's Rep. 287. (2) 3 Madd. 302, n.
(3) 6 H. & N. 870.

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Newstead v. *Searles* (1) and *Clayton* v. *Earl of Winton* (2), and said that the present case appeared to him to come directly within the principle of *Newstead* v. *Searles*. I have already said what I consider the principle of the decision in *Newstead* v. *Searles* to be; and for reasons which I have given, with the greatest respect for the Lord Chief Justice, I say that *Dickenson* v. *Wright* (3) does not appear to me to come directly within the decision in *Newstead* v. *Searles*. Mr. Justice *Blackburn* approved of and adopted a paragraph from Mr. *Dart's* work, which says (4), "If such a stipulation cannot be presumed or proved"—a stipulation on the part of one of the contracting parties that the other contracting party shall settle some of his own property in a particular way—"the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bonâ fide* purchaser." Subsequently he said, "Yet when, as in *Newstead* v. *Searles* and *Clayton* v. *Earl of Winton*, and, as I think, in the principal case, the limitations so interfere with those which would naturally be made in favour of the husband, wife, and issue as to indicate that the limitations must have been discussed, and made part of the marriage contract, part of the reciprocal considerations between the husband and wife, that presumption is rebutted and the limitations are not voluntary." I say that I adopt what is here said by Mr. Justice *Blackburn;* but it is, I consider, inapplicable to the case now before me. The question which arises upon the construction of the settlement is: is it, or is it not, to be collected from the settlement that the intended wife stipulated that the intended husband should settle some of his own property upon his child by a former wife? I think not. I think the bargain was that the property should in substance, so far as regards the issue of the intended marriage and the intended wife, not be brought into settlement at all, but be left to the intended husband to make a settlement upon his son, this being, as a matter of convenience and economy, done by the same instrument as the settlement of the wife's property.

It was said that there was evidence to shew that there was a contract made in favour of the child of the intended husband by the first wife. For that purpose reliance was placed upon the

(1) West's Rep. 287.
(2) 3 Madd. 302, n.
(3) 5 H. & N. 401.
(4) 6 Ibid. 865.

6th paragraph of the answer of *Thomas Jenkins* the elder. But that paragraph, giving full weight to it, so far from supporting the proposition contended for, that this is a settlement, the result of a contract made by the intended wife in favour of the child of the husband by his first wife, is entirely the other way. [His Lordship read paragraph 6.] According to that statement, the Defendant said, I stipulated with my intended wife that this property should be left to me in order to be settled upon my son; I was the party who was desiring and intending that to be done. She consented to my being able to do it; but it was no bargain on her part that any such settlement should be made. She claimed no interest in this property, but she left it out of settlement without making any requisition in respect of it, and left it to me, because I was anxious to make a settlement myself of that upon my son; I stipulated for that, and she consented; so that she merely gave her consent to that being done by me for which I stipulated, and it was not a settlement made by her, or through her, or at her instance in any way." I refer to that in aid of the conclusion that this is nothing more than an ordinary voluntary settlement by a father upon his son, and is therefore inoperative as against a purchaser for valuable consideration. There must be a declaration to the effect that the settlement is inoperative as against the contract, and as against the conveyance to be made to the purchaser. There must be the usual declaration that the purchaser is entitled to specific performance, and a decree for that purpose. The original Defendant must pay the costs of the suit; and as regards the son, who has been made a party, there will be no order as to costs.

Solicitors: *Charles R. James*, agent for *C. F.* and *G. James*, *Merthyr Tydvil*; *Sharp & Ullithorne*, agents for *Simons & Plews*, *Merthyr Tydvil*.

V.-C. H.
1876
Dec. 2.

SENIOR *v.* HEREFORD.

[1876 S. 224.]

Partition Action—Evidence—Form of Judgment.

Where in a partition action, parties claiming under a derivative title proposed to take a judgment directing inquiries as to the persons interested, with an order for sale of the estates dependent upon the result of those inquiries:—

Held, that the only evidence necessary (in addition to the will whereby the tenancy in common was created) was a general affidavit concisely verifying the statement of claim.

Form of judgment in such an action.

Statement.

THIS was a partition action in which the Plaintiffs were trustees for sale of one moiety of the estates, which moiety had been devised to them upon such trusts by one of the two original tenants in common; and the Defendant was an infant in whom the other moiety was vested, it having descended to him as the heir-at-law of the heir-at-law of the other original tenant in common.

A statement of claim had been delivered by the Plaintiffs, but no statement of defence had been delivered, nor had any evidence been gone into.

Argument.

W. W. Knox, for the Plaintiffs, proposed to take a judgment in accordance with the form adopted in *Mildmay* v. *Quicke* (1) and *Lawe* v. *Stoney* (V.-C. H. April 1, 1876), *i.e.*, an inquiry as to the persons interested, with an order for sale dependent on the result of those inquiries, supplemented by the clause added by the Master of the Rolls in *Lackenby* v. *Lackenby* (M. R. Feb. 25, 1876), which provides for the case of a certificate finding that all the persons interested are not parties. He also asked whether, under the circumstances, any evidence should now be adduced in addition to the will by which the tenancy in common was created.

Gayer, for the Defendant, assented to a judgment in the form proposed.

(1) Law Rep. 20 Eq. 537.

HALL, V.C., said that a general affidavit concisely verifying the statement of claim had better be supplied, and gave a judgment in the form proposed, but with the addition of the words adopted by his Lordship in *Scott* v. *Watson* (V.-C. H. July 8, 1876); *Pemberton* on Judgments (1).

Judgment.

The following was the order made:—

The Plaintiffs, who claim to be interested in a moiety or upwards of the freehold and copyhold hereditaments in the first and second parts of the schedule to the statement of claim in this action mentioned, and in all other (if any) the freehold and copyhold hereditaments devised in undivided shares by the will of *William Tuder*, deceased, in the said statement of claim mentioned, by their counsel requesting a sale of the same hereditaments, and a distribution of the proceeds instead of a division of the same between or among the persons interested.

The Court doth order that an inquiry be made who are the persons interested in the said hereditaments, and in what shares and proportions, and for what estates and interests, and whether they are parties to this action. And if it shall be certified that all the persons interested in the said hereditaments are parties to this action, and that the Plaintiffs are interested to the extent of one moiety or upwards in the said hereditaments, and request a sale thereof, it is ordered that the said hereditaments be sold with the approbation of the Judge. And it is ordered that the money to arise from such sale be paid into Court to the credit of this action, "*Senior* v. *Hereford* [1876 S. 224].—Proceeds of sale of the testator's freehold and copyhold estates;" but if it shall be certified that all the persons interested are not parties to this action, it is ordered that any of the persons interested are to be at liberty to apply to the Judge at Chambers for a sale, when it shall have been certified that all persons who are not parties, and who ought to be served with notice of this decree, have been so served, and that the parties or party interested collectively or individually to the extent of one moiety or upwards in the said hereditaments request a sale.

And it is ordered that the further consideration of this action be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

Solicitors: *Walters, Young, Walters, Deverell, & Walters.*

(1) 2nd Ed. p. 574.

C. J. B.
1876
Dec. 4, 11.

In re S. J. ESLICK.
Ex parte PHILLIPS.
Ex parte ALEXANDER.

Reputed Ownership—Order and Disposition—Withdrawal of Consent of True Owner—Bill of Sale of Goods in two separate Houses—Possession of Goods in one House taken before Notice of Act of Bankruptcy.

A trader executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling-house to secure a debt. The shop and the dwelling-house were situate in different streets in the same town. An agent of the bill of sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture till after he had received notice of the filing of the petition :—

Held, that the possession taken of the stock-in-trade operated as a withdrawal of the consent of the mortgagee to the furniture remaining in the debtor's order and disposition.

The day before the possession was taken the mortgagee had instructed his agent to go and take possession of the property.

Semble, that the giving of these instructions amounted to a withdrawal of the mortgagee's consent to the property remaining in the debtor's order and disposition.

Statement.

THESE were two appeals from an order made by the Judge of the *Aberdare* County Court.

S. J. Eslick was an upholsterer at *Aberdare*. He carried on his business at No. 19, *Dean Street*, and he resided at No. 15, *Seymour Street, Aberdare*. On the 2nd of March, 1876, he executed a bill of sale by way of mortgage in favour of *Moses Phillips*. In this deed *Eslick* was described as of 19, *Dean Street*, and of 15, *Seymour Street, Aberdare*. It contained a recital that *Phillips* had agreed to lend *Eslick* £300 upon having the repayment thereof, together with £63 for interest thereon, secured in manner thereinafter expressed ; and by the operative part, in consideration of the £300 so advanced, *Eslick* assigned to *Phillips* all and singular the furniture, fixtures, utensils, books, plate, linen, and other goods, chattels, and effects specified and referred to in the schedule thereinafter written, and belonging to the mortgagor, then being in or about the dwelling-house and premises of the mortgagor at No. 19, *Dean Street*, and also all other goods, chattels,

and effects whatsoever of the mortgagor in or about the said premises not comprised in the said schedule, and also all or any goods, chattels, and effects whatsoever which at any time thereafter should be in or about the same or any other premises of the mortgagor, whether brought there in substitution for, renewal of, or in addition to the goods, chattels, and effects thereby assigned, or any of them, or otherwise howsoever: To hold the same to the mortgagee absolutely, but subject as thereinafter mentioned: Provided that, in case the mortgagor should pay to the mortgagee the sum of £363 by twelve consecutive monthly instalments of £30 5*s.* each, the first to be paid on the 2nd of April, 1876 (and in default of payment of any one instalment, he should forthwith pay the whole amount remaining unpaid), until by means of such payments the said sum should have been fully satisfied, together with all costs, payments, charges, and expenses thereinafter mentioned, then the deed should cease and become void. And it was provided that if the mortgagor should make default in payment of the sum thereby secured, or any part thereof, at the times and in the manner thereinbefore provided for payment thereof, or (whether such default should have been made or not) in case he should suffer the goods to be distrained for rent, rates, or taxes, or to be seized under any legal process, or should remove or suffer to be removed the goods, or any of them, from the premises without the previous consent in writing of the mortgagor, or should make any assignment for the benefit of creditors, or file a liquidation petition, or render himself liable to be made or become bankrupt, then it should be lawful for the mortgagee forthwith, and without any previous notice or demand, to take possession of the mortgaged property, and to sell it and repay himself. There was a further power given to the mortgagee at any time, whether default should have been made in payment of the before-mentioned sum or any part thereof or not, to seize the property and retain possession thereof.

The schedule comprised, first, the stock-in-trade in the mortgagor's business premises; and, secondly, the household furniture and effects at 15, *Seymour Street*, his dwelling-house. The execution of the deed was attested by *W. H. Bidgood*, an auctioneer residing at *Cardiff*, where *Phillips*, who was a money-lender, also resided.

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The bill of sale was duly registered, and *Bidgood* made the statutory affidavit on the occasion of the registration.

The instalments which fell due in April, May, and June were paid by *Eslick*. On the 28th of June, 1876, *Phillips*, having heard that *Eslick* had been removing some of the property comprised in the bill of sale, instructed *Bidgood* to go over to *Aberdare*, and, if he found that this had been done, to seize the whole of the property and sell it forthwith. *Bidgood* left *Cardiff* by the first train the next morning, and arrived at *Aberdare* about 9.25 A.M. He then went to *Eslick's* shop at 19, *Dean Street*. *Eslick* was not there, but *Bidgood* went in and commenced taking an inventory of the property. At ten o'clock the same morning *Eslick* filed a liquidation petition in the County Court, but *Bidgood* had no notice of this until after he had entered upon 19, *Dean Street*. He afterwards put a man into possession, and later in the afternoon of the same day he put another man into possession of the property at 15, *Seymour Street*, but this was not done until after he had received notice of the filing of the petition. *D. T. Alexander* was subsequently appointed trustee under the petition. He applied to the Court for an order declaring that the property comprised in the bill of sale was, at the commencement of the liquidation, in the order and disposition of the debtor with the consent of *Phillips*, and had therefore passed to the trustee, and also that the property in No. 15, *Seymour Street*, was not comprised in the bill of sale at all. Both the debtor and his father (who was present when the bill of sale was executed) deposed that that part of the schedule which related to the property in No. 15, *Seymour Street*, was not there at the time of the execution, and the suggestion was made that it had been added after the execution without the knowledge of the debtor. Both *Phillips* and *Bidgood*, on the contrary, deposed that no alteration had been made in the schedule since the execution of the deed. The Judge found as a fact that the alleged alteration had been made after the execution, and consequently that the *Seymour Street* property was not comprised in the deed. His Honour also held that the goods in No. 19, *Dean Street*, were not in the debtor's order and disposition at the commencement of the liquidation. He decided, therefore, that *Phillips* was entitled to the *Dean Street* property, and that the trustee was entitled to the

Seymour Street property. *Phillips* appealed from that part of the order which related to the *Seymour Street* property, and the trustee appealed from that part which related to the *Dean Street* property.

Winslow, Q.C., and *E. C. Willis*, for *Phillips*:—

The words "at No. 19, *Dean Street*," in the operative part of the bill of sale are mere misdescription, and do not limit the generality of the other words, which are sufficient to include the *Seymour Street* property: *Doe* v. *Carpenter* (1). So that, independently of the schedule, the *Seymour Street* property was included. But on the evidence we contend that the Judge was not justified in finding that the schedule had been altered after the execution of the deed. And as to the question of order and disposition, *Phillips*, by giving instructions to *Bidgood* on the 28th of June, withdrew his consent to any part of the property remaining in the order and disposition of the debtor. The evidence is clear that *Bidgood* took possession of the *Dean Street* property before he had any notice of the act of bankruptcy, and his taking possession of that was a virtual taking possession of the *Seymour Street* property also.

De Gex, Q.C., and *Finlay Knight*, for the trustee:—

The debtor and his father having both positively sworn that the schedule had been altered, it was the duty of the trustee to submit the question to the Court. It is clear that possession of the *Seymour Street* property was not taken until long after *Bidgood* knew of the filing of the petition; that, therefore, was ineffectual. But, in truth, *Phillips* had no right to take possession of any of the property, as no default had been made in payment of any of the instalments of the debt. And, before *Bidgood* had notice of the filing of the petition, he, according to his own story, had done nothing but begin taking an inventory of the *Dean Street* property; he had made no demand for payment, and had done no act amounting to taking possession. The property in both the houses therefore remained in the debtor's order and disposition. As to the alleged alteration in the schedule, the debtor and his father are disinterested witnesses; *Phillips* and *Bidgood* have both of them a

(1) 16 Q. B. 181.

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strong interest in the matter. *Doe* v. *Carpenter* (1) was a case of a will, not a deed. *Ex parte Arnold* (2) shews that the giving the instructions to *Bidgood* did not amount to a withdrawal of *Phillips'* consent.

Bacon, C.J., after stating the provisions of the bill of sale, continued:—

Upon the construction of the deed itself I do not think it possible to doubt that it is an effectual assignment, by way of mortgage, of all the articles specified, all the chattels as well in *Seymour Street* as in *Dean Street*. But it is said that this instrument is impeached by the evidence, and this is perhaps the most important of the points which have been argued. The deed is proved by the attesting witness to have been when it was executed by the mortgagor in the state in which it now appears. The deed is produced in that form, and it is impeached by the debtor and his father, who say that the last paragraph in the schedule has been added since the deed was executed. Was it ever heard of in any Court that a deed could be impeached by such evidence and upon such grounds? A deed, which on its face is open to no suspicion, and which is proved by the attesting witness, is sought to be impeached by such a statement as that. I say that such evidence is not to be regarded. It does not, however, rest there, because the witnesses were cross-examined, and the learned Judge, as I understand, was of opinion that there were some other circumstances which raised suspicion, for instance, that there is a difference in the colour of the ink in the two parts of the schedule. I can see no such difference. I can see a difference in the ink with which the attesting witness's name is signed and the other ink; but that is explained, because he says that he did not attest it until he got to his house at night, and then he wrote his name at the bottom of it. That is the only difference that I can find in the colour of the ink. Then it has been urged by Mr. *De Gex* that there is a line drawn under the first part of the schedule, from which the inference is that the contents originally ended where that line was drawn. I do not think that any such inference properly arises. The circumstance is a

(1) 16 Q. B. 181. (2) 3 Ch. D. 70.

trifling one in itself, but it is exactly that which in the most common course of business would be likely to happen. The man who draws the schedule has two paragraphs to deal with—two different schedules, if you like to call them so. Having finished one he draws a line to separate it from that which follows. I think that the existence of that line does not give rise to the shadow of a suspicion. I am unable to concur with the learned Judge in saying that the deed was not executed in the form in which it now appears, forming my judgment upon that kind of evidence by which deeds are ordinarily proved in Courts of justice.

Then comes the question of order and disposition. In the argument on behalf of the trustee that phrase has been repeated very often, but those pertinent words of the statute, "with the consent of the true owner," have been always omitted. And what kind of consent is to be ascribed to the true owner here? The question of order and disposition with the consent of the true owner has been at all times in the administration of bankruptcy, and still is, a question for the jury, a question of fact, and you must prove the fact that the true owner consented equally with the fact, if you rely upon it, that the goods were in the order and disposition of the debtor. Can a revocation of the consent be by any human means established more distinctly than it is upon the evidence here? The mortgagee the night before the day on which the seizure is made authorizes his agent to go to the place, and, by virtue of the mortgage which he holds, then and there to take possession of the goods. That is his act, and that is the mission of his agent. The agent goes and he meets the debtor at the railway station. He goes to his house, he executes his mission; he does not literally lay hands on the goods, but he walks in and takes possession of them exactly as a sheriff's officer takes possession of goods when he is putting in force a writ of execution; that is, he takes possession and would not allow any one else to remove them. How could there be a more plain and perfect possession taken in the eye of the law or as a matter of fact than that which *Bidgood* took on that morning, and, as the evidence plainly proves, before the liquidation petition was filed. According to the practice of the Court it could not be filed before ten o'clock,

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and possession was taken sufficiently long before ten o'clock. Then it is said that he did not take possession of the property in *Seymour Street* before the filing of the petition. He did take possession of what he then could. If he were busy in securing that which was at *Dean Street*, and had not time until three o'clock in the afternoon to go up to *Seymour Street*, that is, in my opinion, a sufficient taking of possession. If he went in by virtue of this deed, which comprehended *Seymour Street* as well as *Dean Street*, and took possession of *Dean Street*, and as soon as he could went on to *Seymour Street*, that, I think, was enough. But where is the consent of the mortgagee? Assuming that the property in *Seymour Street* was in the order and disposition of the debtor, it was not so with the consent of the true owner. He had done all that he could to assert his title. He has entirely negatived the notion that there was any consent on his part to the property remaining, after *Bidgood* arrived, in the order and disposition of the debtor. I do not know any authority, and I do not believe there is any, which says that taking possession of part of the property only, releases the rest. There was one case where execution was levied, and an attempt was made to say that it was a partial levy only, but in that case, although some of the goods were situated at a distance, it was decided that the execution was perfect. But, without any reference to that case, and simply on the facts before me, and on the well established law applicable to this question, I think that the attempt to impeach this bill of sale has wholly failed, that its true construction is beyond a doubt, and that it is proved that before the liquidation petition was filed the consent of the mortgagee was withdrawn, even if possession had not been taken of the property. I am of opinion, therefore, that the mortgagee is entitled to the proceeds of the goods both in *Dean Street* and in *Seymour Street*. The trustee must pay the mortgagee's costs of both the appeals, but I make no order as to the costs of the hearing in the County Court.

Solicitors for Mortgagee: *Bell, Brodrick, & Gray*, agents for *H. P. Linton, Aberdare.*

Solicitors for Trustee: *Hacon & Turner*, agents for *D. Richards, Aberdare.*

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C. J. B.

1876

Nov. 20; *Dec.* 18.

Bill of Sale—Registration—Fixtures—Bills of Sale Act, 1854 (17 & 18 *Vict.* c. 36), *ss.* 1, 7.

A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling-houses, and at the end of the term to yield up to the lessor the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mortgage deed assigning the land, together with the steam saw-mills and buildings thereon, and the steam-engines, boilers, fixed and moveable machinery, plant, implements, and utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments, and such of the machinery, plant, &c., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term, and as to such of the machinery and premises as were in the nature of tenants' or trade fixtures to the mortgagee absolutely, subject to redemption.

The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the *Bills of Sale Act*. The mortgagor filed a liquidation petition. The mortgage money remained due. The mortgagee had not taken possession of any of the property comprised in the deed:—

Held, that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed, not having been registered under the *Bills of Sale Act*, was void *qua* the trade fixtures as against the trustee in the liquidation.

Statement.

THIS was an appeal from a decision of the Judge of the *Aberdare* County Court.

By an indenture of lease dated the 13th of May, 1874, the *Waynes Merthyr Steam Coal and Iron Works, Limited*, demised to *Elisha Eslick*, a cabinet maker and timber merchant at *Aberdare*, his executors, administrators, and assigns, a piece of ground in *Aberdare* for the residue of a term of sixty-eight years from the 25th of March, 1856 (less the last three days of the term), at the yearly rent of £50. The lease contained a covenant by the lessee that he would at his own cost, on or before the 1st of January, 1875, build and completely finish on the demised premises a build-

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ing for the purposes of a steam saw-mill, or messuages, or dwelling-houses. And also would at all times during the demise, at his own cost, uphold, repair, maintain, paint, cleanse, and keep the said buildings, &c., and the fixtures and other conveniences which should belong thereto; and also would, at the end or other sooner determination of the demise, yield up to the lessors the said piece of ground, buildings, &c., and all fixtures and other things whatsoever which during the said term should be fixed to the freehold of the said premises, in good repair and condition in all respects, except the steam saw-mill, apparatus, machinery, fixtures, and things connected therewith, and which it was thereby agreed the lessee might remove, making good however all such damage as might be done to the premises in such removal.

By an indenture of mortgage dated the 22nd of August, 1874, and made between *Eslick* of the one part, and *Marcus Moxham*, a timber merchant at *Swansea*, of the other part, after a recital of the lease of the 13th of May, 1874, it was witnessed that, in consideration of £1300 lent to *Eslick* by *Moxham*, *Eslick* covenanted to repay the £1300 with interest on the 1st of January, 1875; and *Eslick* assigned to *Moxham* all and singular the piece of ground, hereditaments, and premises comprised in the lease, "together with the steam saw-mills, offices, erections, and buildings which have been or may hereafter be erected, constructed, and built upon the said piece of ground, and the steam-engines, boilers, fixed and moveable machinery, plant, implements, and utensils now or hereafter fixed to or placed upon or used in or about the said ground, hereditaments, saw-mills, offices, and buildings: To have and to hold the said hereditaments and such of the said machinery, plant, utensils, and premises hereinbefore expressed to be hereby assigned as are in the nature of landlord's fixtures and cannot lawfully be removed by the lessee, unto the said *M. Moxham*, his executors, administrators, and assigns henceforth for all the residue now to come and unexpired of the said term of sixty-eight years less three days; and, as to the rest of the said machinery and premises as are in the nature of tenant's or trade fixtures and can lawfully be removed by the lessee thereof, unto the said *M. Moxham*, his executors, administrators, and

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assigns, absolutely," subject to a proviso for reassignment on payment of the mortgage money and interest. The deed contained a power for the mortgagee, at any time after the 1st of January, 1875, without any further consent on the part of the mortgagor, "to sell the said premises hereinbefore expressed to be hereby assigned, or any part or parts thereof, either together or in parcels." This deed was not registered under the *Bills of Sale Act.*

Statement.

In July, 1876, *Eslick* filed a liquidation petition. His creditors resolved on a liquidation by arrangement, and *D. T. Alexander* was appointed trustee. A considerable sum remained due to *Moxham* upon his mortgage. He had not taken possession of any of the mortgaged property.

The trustee applied to the County Court for an order that the steam-engine, saw-mill, machinery, and other trade fixtures, and also the tools, implements, and utensils in and about the steam saw-mills comprised in the mortgage belonged to him and not to the mortgagee. The Judge held that the mortgagee was entitled to the property in question, and refused the application with costs. The trustee appealed.

Moxham made an affidavit, in which he deposed that the premises included in the lease could well be separated for the carrying on of distinct businesses; that saw-mills were not a necessary adjunct to the business of a timber merchant, but might be let and occupied separately from the timber yard; and that the office, also, might be occupied separately, being a detached and separate building. He also said that the machinery could not be taken away from the buildings without injuring them.

Argument.

Little, Q.C., and *Romer*, for the Appellant:—

The mortgage ought to have been registered under the *Bills of Sale Act*, in order to give it validity against the trustee so far as it relates to the tenants' and trade fixtures: *Bills of Sale Act*, 1854 (17 & 18 Vict. c. 36), ss. 1, 7. The principle of the decisions is that, if the fixtures are dealt with separately, so as to give the mortgagee power to remove them and sell them separately from the land and buildings to which they are attached, then the deed must be registered as a bill of sale: *Mather* v. *Fraser* (1); *Water-*

(1) 2 K. & J. 536.

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fall v. *Penistone* (1); *Boyd* v. *Shorrock* (2); *Begbie* v. *Fenwick* (3); *Hawtry* v. *Butlin* (4); *Ex parte Daglish* (5); *Ex parte Barclay* (6). In the present case it was clearly intended to give the mortgagee power to deal with the fixtures separately. Therefore *Ex parte Daglish* applies, and not *Ex parte Barclay*. The County Court Judge thought the House of Lords had taken a different view of the law in *Meux* v. *Jacobs* (7). But in that case there was no bankruptcy; the question was only one of priority between two incumbrancers.

De Gex, Q.C., and *Everitt*, for the mortgagee:—

The turning point of the decision in *Ex parte Daglish* was the language of the power of sale, which was very different from that contained in the deed now in question. Moreover, there the mortgage was made by underlease; here it is made by assignment. The fixtures were there treated as a distinct subject of mortgage, which is not the case here. *Waterfall* v. *Penistone* and *Mather* v. *Fraser* (8) both shew that the true criterion is whether the fixtures would have passed by the deed without being specially named. *Meux* v. *Jacobs*, too, is an authority to shew that they would. The question is, does the contract authorize the mortgagee to sever the fixtures and sell them separately? In the present case the evidence shews that the property might be conveniently sold in separate lots, and therefore the language of the power of sale can be satisfied without implying an intention that the fixtures should be severed. *Ex parte Barclay* therefore applies, and not *Ex parte Daglish*. The severance must be one which is necessarily contemplated by the mortgage deed. The *habendum* in the present case could not properly have been in any other form, and the power of sale does not assist the argument. In *Williams* v. *Evans* (9) it was held that the tenant's fixtures were comprised in a deposit of a lease by way of equitable mortgage. There is no distinction in principle between a mortgage of freeholds and a mortgage of leaseholds.

(1) 6 E. & B. 876.
(2) Law Rep. 5 Eq. 72.
(3) Ibid. 8 Ch. 1075, n.
(4) Ibid. 8 Q. B. 290.
(5) Law Rep. 8 Ch. 1072.
(6) Ibid. 9 Ch. 576.
(7) Ibid. 7 H. L. 481.
(8) 2 K. & J. 536.
(9) 23 Beav. 239.

BACON, C.J. :—

The question is, whether this deed, so far as it relates to the trade fixtures, is within the *Bills of Sale Act* or not. If it is, as it has not been registered it is void as against the trustee in bankruptcy of the mortgagor. That is the question which I have to decide. Without referring to any of the earlier cases, in my opinion the decision in *Ex parte Daglish* (1) covers the present case. The case of *Ex parte Barclay* (2) was distinguished from that, Lord Justice *James* saying that the distinction was thin, but substantial. The distinction was this, that although in *Ex parte Barclay* the deed gave the mortgagee power to sell the mortgaged property, either together or in parcels, yet the Court held that he had no power to sever the trade fixtures from the house and sell them separately. The fixtures passed to him merely as a part of the house by means of the underlease to him. If, however, there is an assignment of fixtures as a separate property, the intention being that the mortgagee shall deal with them separately, then the *Bills of Sale Act* applies. The policy of the law is clear. The words of the assignment in the present case are sufficient to give the mortgagee the fixtures of every kind. Then the *habendum* is in two parts, and nothing can be more distinct and separate than the description of that which is included in the second part of the *habendum*, and which is to be held by the mortgagee absolutely. But in whatever terms the deed may be expressed, the intention of the parties governs the construction. Can there be a shadow of doubt that the mortgagor, being possessed of two kinds of property, that in which he had an absolute interest, and that which he had only the right to use for a term, intended to deal with those two things separately? The language of the power of sale makes the intention of the parties still more distinct. The assignment comprises all the property, but the *habendum* declares that the mortgagee shall hold the two classes of property with perfectly different rights. The cases, as well at Common Law as in the Court of Chancery, appear to have clearly decided that, to render such a separate assignment of trade fixtures valid as against the trustee in bankruptcy of the assignee, the deed must be registered

(1) Law Rep. 8 Ch. 1072. (2) Law Rep. 9 Ch. 576.

C. J. B. 1876 *In re* E. ESLICK. *Ex parte* ALEXANDER. Judgment.

under the *Bills of Sale Act.* The case of *Meux* v. *Jacobs* (1) was a very singular one. The decision of the Master of the Rolls was founded, as the report shews, upon an entire misstatement of the facts. It afterwards was found that neither of the bills of sale had been registered, and in truth the *Bills of Sale Act* had no application, for there had been no bankruptcy of the mortgagor. The judgments of the House of Lords explained very clearly the distinction between those cases to which the *Bills of Sale Act* applies and those to which it does not, and all the previous decisions were reviewed. The decision of the Master of the Rolls was reversed on the ground that the facts of the case were different from those which had been stated to him. In the present case the Judge of the County Court appears to have thought that the House of Lords had in some way impugned the authority of the decision of the Court of Appeal in *Ex parte Daglish* (2). The decision, however, in *Meux* v. *Jacobs* was founded upon the case being one to which the *Bills of Sale Act* had no possible application; it had nothing to do with the question which was decided in *Ex parte Daglish.* The present case is, in my opinion, as clearly within the words of the Act as it is within the policy of the law. It is governed by *Ex parte Daglish,* and not by *Ex parte Barclay* (3). The order of the County Court must be reversed, and it must be declared that the Appellant is entitled to the property, and he must have his costs.

Solicitors for Appellant: *Torr & Co.*, agents for *Griffith & Corbett, Cardiff.*

Solicitors for Mortgagee: *Tamplin, Tayler, & Joseph,* agents for *Strick & Bellingham, Swansea.*

(1) Law Rep. 7 H. L. 481. (2) Law Rep. 8 Ch. 1072.
(3) Law Rep. 9 Ch. 576.

In re FELLS. *Ex parte* ANDREWS.

C. J. B.
1876
Dec. 18, 22.

Bill of Sale—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt—Concurrent Possession by Grantee and Trustee in Bankruptcy of Grantor—Forcible Removal of Property by Grantee—Contempt of Court—Business of Deceased Trader carried on by Executor—Implied Trust of Assets for Benefit of Testator's Creditors.

The grantee of a bill of sale and the trustee in bankruptcy of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property :—

Held, that, notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, and that the grantee must pay the trustee's costs of a motion (which had been refused in the County Court) to compel the restoration into the joint possession of the property which had been removed.

The executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own :—

Held (reversing the decision of the County Court), that the assets of the business in the hands of the executrix were not impressed with any trust in favour of the testator's creditors, and consequently that, on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been converted, passed to her second husband.

Statement.

IN this case there were two appeals from two orders made by the Judge of the *Wandsworth* County Court.

John Southgate was a dairyman and cowkeeper. He died in June, 1872, having by his will appointed his widow, *Sarah Sophia Southgate*, his executrix, and having bequeathed to her the residue of his estate. She proved his will, and she continued to carry on the business after his death, though she was not authorized by the will to do so. On the 6th of June, 1876, she married *Frederick Fells*, and after this marriage she still continued to carry on the business. On the 3rd of August, 1876, *Fells* and his wife executed a bill of sale in favour of *Robert Thilthorpe*, who was brother-in-law to Mrs. *Fells*. The deed contained recitals to the effect that Mrs. *Fells*, previously to her marriage with *Frederick Fells*, was indebted to *Thilthorpe* in the sum of £300; that she, at the time of her marriage with *Fells*, was possessed of the household furniture,

C. J. B. 1876. *In re* FELLS. *Ex parte* ANDREWS. Statement.

cows, and effects mentioned in the schedule to the deed; and that *Thilthorpe* had applied to *Fells* and his wife for payment of the £300, which they were unable to pay. And, by the operative part of the deed, *Fells* and his wife assigned to *Thilthorpe* all and singular the household furniture, cows, horses, carts, vans, stock and implements of trade, and all other the effects mentioned in the schedule, which comprised all the stock-in-trade and effects at the dairy, and also all the household furniture and effects in the dwelling-house of *Fells* and his wife. The assignment was expressed to be an absolute one by way of sale, and *Thilthorpe* by the same deed released *Fells* and his wife from the £300. On the same day *Thilthorpe* took actual possession of the property comprised in the deed. On the 2nd of August *Fells* had committed an act of bankruptcy by failing to comply with a debtor's summons which had been served upon him on the 25th of July. On the 3rd of August the sheriff of *Surrey* also seized the whole of the property under two writs of *fi. fa.*, which had been issued by two judgment creditors in two actions against *Fells* and his wife jointly. On the 3rd of August the creditor who had issued the debtor's summons presented a bankruptcy petition in the County Court against *Fells*, under which, on the 10th of August, *Joseph Andrews* was appointed receiver. On the 22nd of August *Fells* was adjudicated a bankrupt, and on the 22nd of September *Andrews* was appointed trustee. *Andrews* took possession as receiver on the 10th of August of the property comprised in the bill of sale, and continued in possession on his appointment as trustee. The sheriff took out interpleader summonses, and ultimately an order was made by the County Court restraining the sheriff from selling. On the 22nd of September the sheriff withdrew. On the 7th of October *Thilthorpe* forcibly removed two of the cows from the dairy. The trustee applied to the County Court for an order that *Thilthorpe* should restore these two cows, and afterwards for an order to set aside the bill of sale as a fraudulent preference and an act of bankruptcy.

Thilthorpe was examined, and he stated that part of the debt of £300 was contracted by *John Southgate* in his lifetime. Mrs. *Fells* was examined, and she stated that some of the creditors of her late husband, *John Southgate* (besides *Thilthorpe*), were still

unpaid, and that the cows of which she became possessed as executrix of *John Southgate* had been sold by her, and other cows bought. *Fells* was examined, and stated that, in addition to the property comprised in the bill of sale, he had nothing except a horse and two carts, which he had used in the business of a dealer in hay, which he had carried on separately. On the 24th of October the Judge dismissed with costs the trustee's application for the restoration of the two cows, upon the undertaking of *Thilthorpe* not to part with the two cows for a month from the date of the order. On the 7th of November the Judge made an order upon the other application, declaring that the bill of sale was fraudulent and void as against the trustee with regard to any surplus which might remain of the property comprised in it after payment or satisfaction of the just debts of *John Southgate* remaining unpaid. And it was ordered that *Thilthorpe* should feed, milk, and tend the cows, the subject-matter of the motion, until the further order of the Court, he undertaking to keep an account of the proceeds of the sale of the milk, and not to sell the two cows removed by him, the trustee undertaking not to sell the property comprised in the bill of sale until the further order of the Court.

Statement.

From both these orders the trustee appealed.

Cookson, Q.C., and *Edward Thomas*, for the Appellant:—

Argument.

The forcible removal of the two cows out of the possession of the trustee was a contempt of Court: *Ex parte Cochrane* (1); and the trustee's application for their restoration ought to have been granted.

The bill of sale ought to have been declared void against the trustee without any qualification. There is nothing to shew that there is any unsatisfied creditor of *Southgate*, except *Thilthorpe*, and, even if there were, the assets are not impressed with any trust.

De Gex, Q.C., and *R. Vaughan Williams*, for *Thilthorpe*:—

If trust property is sold, and the proceeds are invested in other property, that substituted property, if it can be identified, is sub-

(1) Law Rep. 20 Eq. 282.

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Argument.

ject to the trust. *Ex parte Thomas* (1), which might seem to be an authority against us, was the case of possession being taken of the business of an intestate by a wrongdoer. Here the possession of the widow was rightful, and the property is identified, and *Thilthorpe*, so far as he was a creditor of *Southgate*, is entitled to be paid out of his assets. His assets did not on the second marriage pass to the second husband: *Kitchen* v. *Ibbetson* (2). No question of order and disposition can arise, as the wife was the true owner. As to *Ex parte Cochrane* (3), there the receiver was first in possession, and the mortgagee interfered with his possession. In the present case the grantee was in possession before the receiver, and it must be assumed, until the contrary was shewn, that his possession was rightful. The Judge was right in not making the summary order asked for, and in waiting till the question of the validity of the bill of sale had been decided, keeping things *in statu quo* by means of the undertaking of *Thilthorpe* not to part with the two cows.

Judgment.

BACON, C.J.:—

The learned Judge of the County Court seems to have considered that a widow who carried on business as a sole trader from the year 1872, when her husband died, till her second marriage, in the year 1876, is to be considered a trustee for the purpose of selling as trust property the property of which her first husband died possessed, she having been his executrix. No case has been referred to, no authority, no principle can be mentioned, which justifies any such conclusion. She, with the full knowledge, as I must assume, of all the creditors of her first husband, continued to carry on the business. She converted his cows into money. What she did with the money does not in the least signify, because it does not come at all within the principle of those cases in which trust property converted into money and again invested in other property is still charged with the trust. Dealing in the ordinary course of a dairywoman's business, she sells the cows, she milks them, she sells the milk; but she carries on the business as the sole ostensible trader; no suggestion of any trust is made by any

(1) 3 M. D. & D. 40. (2) Law Rep. 17 Eq. 46.
(3) Law Rep. 20 Eq. 282.

one; no objection is taken by the creditors, the *cestuis que trust*, if they are to be so called. In her order and disposition, practically, all this property is left until the month of June, 1876. In June the marriage takes place between her and the present bankrupt. Upon that marriage all that was hers became his, and the liability to pay all her debts fell upon him. If she had committed a *devastavit* of her late husband's estate the second husband was answerable for it, and it might have been enforced against him. Well, he became bankrupt. Then, after he had committed an act of bankruptcy, he made an assignment of this property, of which he became the owner in his marital right, to a creditor of his wife's late husband, who was a creditor of his own; he makes a bill of sale to that creditor, and that creditor admitted, upon his examination, that he knew perfectly well at that time that proceedings in bankruptcy were being taken against the second husband. A more plain fraudulent preference of *Thilthorpe* over the other creditors of the bankrupt cannot possibly be conceived. Neither upon the ground of the property being trust property, of which there is no evidence, nor upon the ground of the transaction being protected by the bankrupt law, can it be said that the bill of sale is not utterly and entirely void. The notion seems to have found favour with the learned Judge that the creditors of the late husband had some prior right in the administering of the bankrupt's estate, and, therefore, though he set aside the bill of sale (it is impossible that he could have done otherwise), yet he reserved out of the operation of his order so much of the property as was necessary to answer the unpaid debts of the late husband. There is not the slightest ground for making such an exception. The bill of sale, purporting to assign all that the husband and wife had is void, and, being void, the bankrupt's creditors are entitled to all that he had and all that his wife had. Therefore the bill of sale must be set aside, and the estate of the bankrupt administered without regard to that imaginary trust which has formed the foundation of the learned Judge's order.

The other question stands on a somewhat different footing. The bill of sale holder is said to have taken possession on the morning of the 3rd of August. The sheriff's officer afterwards came into possession, and they had concurrent possession. Then the receiver

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was appointed and put into possession, and at a later period he was appointed trustee, and remained in possession. That was no less a concurrent possession, even if the bill of sale holder had any right to possession. But the question of the validity of the bill of sale was then standing for decision by a Court having jurisdiction in bankruptcy, between the bill of sale holder and the trustee who claimed the property, and in this state of things the bill of sale holder takes upon himself to remove some of the goods. He broke the concurrent possession. He helped himself to two of the cows, and took them away. That, in my opinion, was a very unjustifiable act on his part. I think that, although no previous order had been made by the Court, the trustee was perfectly right in coming to the Court and saying, "Until this matter is decided, at least make the bill of sale holder bring back those two cows. Order him to bring them back and leave things as they were, and then pronounce your decision on the validity of the bill of sale." That is what the trustee asked by that motion, which the learned Judge thought fit to refuse, making the trustee pay the costs of it. Why should that be? The trustee's complaint was this, "My possession, concurrent if you will, is disturbed by the act of the bill of sale holder. I ask you to restore things to the state in which they were, and in which they ought to be when you pronounce your decision." That was a perfectly proper application, and one upon which an order ought to have been made for the restoration of the possession—concurrent if you will—of the two cows which had been removed. That order ought then to have been made. But it is unnecessary now to do more than discharge the order which the learned Judge has made so far as regards the payment of costs, and to direct that the present Respondent shall pay the costs of that motion. And on the other motion an order must now be made that, the bill of sale being utterly void against the trustee, the property comprised in it must be delivered to him to be by him administered in the bankruptcy as part of the bankrupt's estate. The Respondent must pay the costs of the two applications, both here and in the County Court.

Solicitor for Appellant: *G. Castle.*
Solicitor for Respondent: *W. T. Boydell.*

In re CLARK. *Ex parte* NEWLAND.

C. J. B. 1876 Dec. 22.

Composition—Enforcing Payment—Money placed in Hands of Debtor's Solicitor —Trust on behalf of Creditors—Solicitor's Lien for Costs.

The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution, and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the Court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:—

Held, that the solicitor had constituted himself a trustee of the money for the creditors, and that the Court had jurisdiction to order him to pay the applicant his proportion of the second instalment, which he was accordingly ordered to pay, with the applicant's costs.

Statement.

THIS was an appeal from a decision of the Judge of the *Luton* County Court.

On the 28th of October, 1874, *William Clark*, a farmer, filed a liquidation petition. Mr. *Richard Hall* acted as his solicitor in the proceedings. The first meeting of the creditors was held on the 20th of November, when it was resolved to accept a composition of 5*s.* in the pound, payable in two instalments, viz., 2*s.* on the 21st of December, 1874, and 3*s.* on the 30th of September, 1875, and that the second instalment should be secured by the joint and several promissory note of *George Elliott* and *Elizabeth Wilson*. The resolution was duly confirmed at the second meeting, on the 3rd of December, 1874. No trustee was appointed in the matter of the composition. The resolution was registered by *Hall*, and he, out of moneys supplied to him by *Clark*, paid the first instalment to the creditors who had proved their debts. The second instalment was

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not paid when it became due, but on the 8th of January 1876, *Hall* sent the following circular letter to the creditors who had proved :—

"In the matter of the composition between *William Clark* and his creditors.

"Sir,—I beg to inform you that on the 22nd instant I shall be prepared to pay to you the sum of 3*s.* in the pound, being the second instalment of this composition. The amount will be payable at my office.

"I am, Sir, your obedient servant,

"(Signed) *Richard Hall*,

"Solicitor for the said *William Clark*."

This circular was received by *H. P. Newland*, one of the creditors, who had proved a debt of £62 13*s.* 9*d.* He made repeated applications to *Hall* for payment of the 3*s.* in the pound on his debt, but was unable to obtain payment, and in September, 1876, he applied to the County Court for an order upon *Hall* to pay him £9 8*s.* 3*d.*, the amount due to him. In opposition to the application *Hall* made an affidavit, in which he said that in the matter of the composition he acted solely as solicitor for *Clark*; that on the 4th of September, 1875, *Clark* executed a bill of sale of his growing crops, furniture, stock, and other personal effects to *George Elliott*, to secure a debt of £1600 then due from him to *Elliott*, and *Elliott* thereby covenanted with *Clark* that he would on the 25th of September, 1875, pay the sum of £286 4*s.*, the amount of the joint promissory note of himself and *Elizabeth Wilson*, and the £286 4*s.* was charged in favour of *Elliott* upon the property comprised in the bill of sale. *Hall* went on to say, "On the 10th of November, 1875, I received, under or by virtue of the said assignment and charge, the sum of £236 4*s.*, on account of the said *W. Clark*, to be placed by me to his credit, and which I accordingly did, having previously, in the month of October, received from the said *H. P. Newland* the sum of £50 on account of the said *W. Clark*." *Hall* further stated that he sent the circular letter to the creditors, fully expecting before the 22nd of January, 1876, to see *Clark* and "obtain from him specific

orders for payment of any balance remaining in my hands after payment of my costs." After he had sent the circular he had not seen *Clark*, and he believed that he had absconded. He said that *Clark* owed him a considerable sum for costs incurred in the matter of the composition and in other matters, and he claimed to be entitled to retain those costs out of the moneys in his hands. He admitted that he had paid the second instalment of the composition to some of the creditors, and that he had a balance of £184 7*s.* remaining in his hands, which, however, he said, "I consider I am not justified in parting with except under an order of the said *W. Clark*;" and he added that he claimed a lien upon the sum in his hands for the costs due to him by *Clark*.

Statement.

The Judge dismissed *Newland's* application with costs. *Newland* appealed.

Cooper Wyld, for the Appellant:—

Argument.

The solicitor has constituted himself a trustee on behalf of the creditors, and the Court has jurisdiction to order him to pay the Appellant his share of the second instalment. He is not entitled to any lien for his costs on this money, which was placed in his hands for a specific purpose.

[He was stopped by the Court.]

De Gex, Q.C., and *Macrae Moir*, for the solicitor:—

The solicitor is not a trustee for the creditors. He has acted in the matter only as agent for the debtor. The debtor may be able to sue him, but the debtor is the only person liable to the creditors. The solicitor is entitled to a lien on the money for his costs: *Ex parte Calvert* (1). He is not liable to pay the creditors out of his own pocket. If the composition is not paid the creditors are not without a remedy; their original debts revive, and they can sue the debtor.

BACON, C.J.:—

Judgment.

I think it is impossible to sustain this order, which, indeed, com-

(1) 3 Ch. D. 317.

C. J. B. 1876 *In re* CLARK. *Ex parte* NEWLAND. Judgment.

pels the creditor to pay the costs of an application which ought to have been granted. Nothing can be plainer than the facts of the case. The resolution of the creditors is clear and distinct; the composition is to be paid in two instalments, the second of which is to be secured by the promissory note of two sureties. This note was paid, so far as was necessary, by one of the sureties, and the money was placed in the hands of *Hall*, who was the author, manager, and conductor of the whole business. Then he writes to the creditors, and tells them that he will be ready to pay them the second instalment on a day which he names. And after that it is contended that he will have to pay the applicant out of his own pocket. If the money is in his pocket, still it is not his own money, but money belonging to other people. There is a clear trust of it, which he has himself acknowledged by his circular to the creditors. He refused to pay the Appellant upon the flimsy excuse that he could not do so without instructions from *Clark*, and now that *Clark* has fled he claims to be entitled to keep the money to pay the costs which *Clark* owes him. There is no foundation for this claim. The order of the County Court must be discharged, and instead of it an order must be made that *Hall* do pay the Appellant the second instalment of the composition upon the debt which he has proved, and also pay the costs of this appeal, and of the hearing in the County Court.

Solicitors for Appellant: *Cordwell & Tasman*, agents for *F. C. Scargill, Luton.*

Solicitor for *Hall: G. Hancock*, agent for *Shepherd & Ewen, Luton.*

In re MAYER. *Ex parte* LEWIS.

C. J. B. 1876 Dec. 22.

Liquidation Petition—Change of Place of Meeting mentioned in Debtor's Affidavit — Invalidity of Resolutions — Registration—Fresh first Meeting — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 82, 125—*Bankruptcy Rules*, 1870, *rr.* 208, 252, 254, 256, 259, 295—*Bankruptcy Forms*, 1870, *Nos.* 107, 108, 112.

The affidavit of a debtor filed with his liquidation petition stated that *Stone* would be the most convenient place for the meeting of the creditors, but the notices sent out by the Registrar to the creditors summoned them to meet at *Stafford* :—

Held, that, as no formal order had been made by the Court to change the place of meeting mentioned in the affidavit, the proceedings were invalid, and that the resolutions passed by the creditors could not be registered. But leave was given to the debtor to summon a fresh first meeting.

Statement.

THIS was an appeal from a decision of the Judge of the *Hanley* County Court.

Ralph Mayer, a bootmaker at *Hanley*, filed a liquidation petition on the 2nd of August, 1876. In his affidavit, which his solicitor prepared to be filed in support of the petition (according to No. 107 of the Bankruptcy Forms, 1870), it was stated that it would be most convenient to the creditors whose debts exceeded £10 that the general meeting should be held at *Stone*. Before, however, the notices were sent out to the creditors it was thought that *Stafford* would be a more convenient place for the meeting, and the notices which were handed to the Registrar to be sealed by him were filled up with the name of *Stafford* as the place where the first general meeting was to be held, and they were sent out by the Registrar in that form. The advertisement inserted in the *Gazette* was in the same form. But by an oversight the solicitor omitted to have the affidavit altered so as to correspond with the notices and advertisement. No formal order to change the place of the meeting was made by the Court. The first meeting was held at *Stafford* on the 21st of August, and a resolution was passed accepting a composition of 10*s.* in the pound, and this resolution was confirmed at the second meeting on the 4th of September.

Messrs. *Lewis* and *Johnson*, creditors who had not been present

C. J. B. 1876 *In re* MAYER. *Ex parte* LEWIS.

at either of the meetings, opposed the registration of the resolutions upon several technical grounds, one of which was that the place of meeting mentioned in the debtor's affidavit ought not to have been changed without a special order of the Court, and that, consequently, the proceedings were void on the ground of informality. The Registrar overruled the objection, and the Judge affirmed his decision. *Lewis* and *Johnson* appealed.

Argument.

Robertson Griffiths, for the Appellants:—

Rule 254 of the Bankruptcy Rules, 1870, is imperative, unless a special order is made by the Court under rule 259 (1), to change the place of meeting. The provisions of the Rules not having been complied with, the whole proceedings are void.

Finlay Knight, for the debtor:—

A formal order to change the place of meeting is only necessary when the change is made after the notices have been sent to the creditors. At any rate, in the present case the change was the act of the Court, not of the debtor or his solicitor. The notices are sent out by the Registrar: Rule 256. No creditor has been misled. Sect. 82 of the Act provides that no proceeding shall be invalidated by any formal defect or by any irregularity, unless the Court is of opinion that substantial injustice has been caused, and rule 208 enables the Court to allow amendments to be made. This is a purely technical objection.

Judgment.

BACON, C.J.:—

I quite agree that this may be called a merely technical objec-

(1) Rule 254 provides: "The first general meeting shall be summoned to be held at the place mentioned in the affidavit filed with the petition (subject to such place being changed by the order of the Court, as hereinafter provided)."

Rule 259 provides: "Upon sufficient cause proved to the satisfaction of the Court by the debtor or by any creditor, either *ex parte* or otherwise, the Court may order and direct the place of any general meeting to be changed, provided application be made in such time as will allow notice of the change to be given to the creditors, as hereinafter directed. Any order so made by the Court shall be according to the form in the schedule, and a copy thereof shall be gazetted forthwith, and notice thereof shall be given by the Registrar by sending by post, on or before the eighth day prior to the meeting, a sealed office copy of the order of the Court addressed to the several creditors and to the debtor."

C. J. B. 1876 *In re* MAYER. *Ex parte* LEWIS. Judgment.

tion, but rule 254 contains a positive enactment, which is intended for the protection of creditors, and it must be obeyed. The debtor's affidavit mentioned *Stone* as the most convenient place for the holding of the first meeting. Then something appears to have taken place before the Registrar, and in the hurry of business he listened to a suggestion that *Stafford* would be a better place for the meeting, and the notices were sent out summoning the meeting to be held at *Stafford*. The rule which says that the place of meeting cannot be changed without a special order of the Court was not followed, and consequently the whole proceedings are invalid. The Registrar is not at all to blame, for he only listened to the suggestion of the parties. The objection is, however, a most frivolous one, and I shall not allow the Appellants any costs. The order for the registration will be discharged, but the debtor must have liberty to summon a fresh first meeting.

Solicitors for Appellants: *Cordwell & Tasman*, agents for *B. A. Shires, Leicester.*

Solicitor for Debtor: *H. G. Field*, agent for *W. H. Bishop, Hanley.*

In re GRUBB. *Ex parte* SIMS.

C. J. B. 1877 *Jan.* 22.

Execution against Trader for Sum exceeding £50—Possession Money—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

In ascertaining whether, under sect. 87 of the *Bankruptcy Act*, 1869, an execution against a trader is for a sum exceeding £50, possession money may be included if the sheriff is compelled to take possession.

Observations on *Howes* v. *Young* (1).

Affirmed 5 C.L.D. 375.

Statement.

THIS was an appeal from a decision of the Judge of the *Worcester* County Court.

E. T. Grubb was a dealer in agricultural implements at *Bromyard*. On the 14th of September, 1876, the sheriff of *Herefordshire* levied execution upon his goods under a judgment which had been recovered against him by Messrs. *Sims, Ransome, & Co.* The writ

(1) 1 Ex. D. 146.

C. J. B. 1877 *In re* GRUBB. *Ex parte* SIMS. Statement.

under which the levy was made was indorsed "Levy £44 12*s.*, and £1 10*s.* 6*d.* for costs of execution, and also interest on £44 12*s.*, at 4 per cent. per annum from the 12th September, 1876, until payment, besides sheriff's poundage, officer's fees, costs of levying, and other legal incidental expenses." On the 18th of September *Grubb* filed a liquidation petition, under which *D. Shaw* was appointed trustee. The goods seized were sold on the 26th of October for £58 3*s.* 6*d.* The trustee claimed the money, and his right to it depended upon the question whether the levy was for an amount exceeding £50. It appeared that the sheriff was entitled to £2 6*s.* for poundage, and £1 10*s.* for officer's fee and mileage. These sums, together with the £44 12*s.*, and £1 10*s.* 6*d.* costs of execution, made up a total of £49 18*s.* 6*d.* The sheriff also claimed possession money, at the rate of 5*s.* per day, for each day that his officer remained in possession. If possession money for one day was included, the sum for which the levy was made amounted to £50 3*s.* 6*d.* The trustee contended that at any rate one day's possession money should be allowed; the execution creditors contended that possession money was not included under "legal incidental expenses." The Judge held that the fee of 5*s.* for possession became due upon the act of possession, and that it was therefore a "legal incidental expense," and he held that the trustee was entitled to the proceeds of the sale. The execution creditors appealed.

Argument.

Holl, for the Appellants:—

It was decided in *Ex parte Liverpool Loan Company* (1) that the costs of execution, being part of the sum for which the levy is made, are to be included in determining whether, under sect. 87, the goods "have been taken in execution in respect of a judgment for a sum exceeding £50." In *Howes* v. *Young* (2) it was held that the sheriff's poundage and officer's fee were to be included. It was there said that the test is, for what sum are the goods seized in the first instance? The fees to be demanded by sheriffs are regulated by 1 Vict. c. 55, s. 2, which provides that such fees only can be demanded as are sanctioned by the Judges, and the table of

(1) Law Rep. 7 Ch. 732. (2) 1 Ex. D. 146.

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sheriffs' fees settled by the Judges on the 20th of December, 1837. *Atkinson's* Sheriff Law (1) provides that 5*s. per diem* may be charged "for each man left in possession when absolutely necessary." The right to possession money may never arise, for the debtor may pay out the execution at once, or he may desire the sheriff's officer to remove the goods at once. If he did either of these things, the right to possession money would not arise. In *Howes* v. *Young*, *Bramwell*, B., said (2), "I can understand the argument that possession money ought not to be included in the amount, because the words 'a sum exceeding £50' must mean at the time when the goods are taken, and at that time it is uncertain what the possession money will be, or whether there will be any. But here the suggested difficulty does not arise." In *Masters* v. *Lowther* (3), which was an application for an attachment against a sheriff's officer for extortion, *Jervis*, C.J., pointed out that possession money was only to be allowed when absolutely necessary, and it was held in that case that a charge for possession money was not clearly extortionate. It would be very inconvenient if the sum mentioned in sect. 87 could not be ascertained at the time when the levy was made. The true construction is that only necessary expenses can be included in the amount.

E. C. Willis, for the trustee, was not called upon.

Judgment.

BACON, C.J.:—

This case is hardly worth the time which has been occupied in the argument. The law is very plain. The meaning of sect. 87 is this, that if a trader is in such failing circumstances that he drives a creditor to the utmost proceeding of the law for a sum of £50, then the other creditors ought to have an opportunity of obtaining an equal distribution of his assets. The cases which have been cited shew the principle upon which sect. 87 is to be construed. The writ is indorsed with a direction to levy, besides what is expressly mentioned, "other legal incidental expenses," and the statute 1 Vict. c. 55, s. 2, gave the Judges authority to point out what are the legal incidental expenses, and they have done so. If possession is actually taken by the sheriff, the necessity of

(1) 5th Ed. p. 344. (2) 1 Ex. D. 150. (3) 11 C. B. 948.

C. J. B. 1877 *In re* GRUBB. *Ex parte* SIMS. Judgment.

paying at least 5*s.* for possession money arises. In *Masters* v. *Lowther* (1), *Jervis*, C.J., said that a charge for possession money was not extortionate when it was necessary to have a man in possession. If when the sheriff presented himself the debtor had handed him the money, and had said, Go about your business, or had said, Take away the goods at once, I won't have them left here, there would have been no necessity to take possession. But here possession was actually taken by the officer of the law, and, that being so, within the terms of all the decisions possession money was a legal incidental expense, and, I will add, a necessary expense. In *Howes* v. *Young* (2) the Court did not give a decided opinion on the point, because it was unnecessary for them to do so. In this case I think the Judge was right in including the sum of 5*s.* for possession money. It was a legal expense incidental to the execution.

The appeal will be dismissed with costs.

Solicitors for Appellants: *Dod & Longstaffe.*

Solicitors for Trustee: *Duignan & Smiles*, agents for *F. & H. Corbett, Worcester.*

C. J. B. 1876 Dec. 11.

In re WAUGH. *Ex parte* DICKIN.

Building Contract—License to Employer to seize Materials on Default or Bankruptcy of Contractor—Seizure between Filing of Liquidation Petition and Appointment of Trustee—Protected Transaction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 23, 94, 95, 125.

A builder contracted with a building club to erect some houses for them on their own land. The contract contained a stipulation that, if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract.

The contractor commenced the works and carried them on for some time,

(1) 11 C. B. 948.

(2) 1 Ex. D. 146.

receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2nd of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant :—

Held, that the club were entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within sect. 94 of the *Bankruptcy Act*, 1869.

Statement.

THIS was an appeal from a decision of the Judge of the *Bradford* County Court.

John Waugh was a contractor at *Bradford*, carrying on his business as *John Waugh & Co.*

On the 19th of December, 1874, he entered into a contract with a building club, called the *Fairfield Building Club*, to erect some houses for them on land belonging to them for the sum of £7700. The contract contained (*inter alia*) the following stipulations :—

"6. Should the contractors neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architects, or become bankrupt, or insolvent, or otherwise rendered incapable of completing their contract, the architects shall have full power, after giving two clear days' notice in writing to such contractors, or leaving such written notice at their usual places of business or residence, to order and appoint such other persons to proceed with and to complete the work as they may think fit, and to provide, or cause to be provided, all such materials as may be requisite for the same. The architects shall also in such case have full power to seize and retain all materials, plant, and implements, and also all materials wholly or partially made up or completed, and ready for fixing, and which were intended to be fixed upon the proprietor's work, but which shall not yet have been removed from the contractors' or manufacturers' premises, provided that the contractors shall have drawn and obtained money on account of this contract; the architects may then either have such work and materials proceeded with and completed, or they may sell them and apply the proceeds to the completion of the work."

Waugh commenced the works and carried them on for some

C. J. B. 1876 *In re* WAUGH. *Ex parte* DICKIN. Statement.

time, but, before they were completed, he, on the 30th of May, 1876, filed a liquidation petition. Prior to this he had received sums amounting to £7000 from the building club under the contract. On the 2nd of June *C. J. Buckley* and *A. Rhodes* were appointed joint receivers under the petition. *Rhodes* was the clerk of the works appointed by the architects of the building club. He had, on the 30th of May, made an affidavit stating his willingness to act as receiver and manager under the petition. On the 1st of June the architects sent the following written notice to *Waugh*:—

"As you have neglected to proceed with the work and buildings for which you have contracted with this society, we hereby give you notice that on the expiration of two clear days from this date we intend to employ other means, and to provide materials for completing the work. And we also give you notice that from and after this date you must not remove from their present position any materials, implements, or plant used, or intended to be used, in and about the works and buildings of this society, as under the conditions of your contract all such materials, implements, and plant belong to the *Fairfield Building Society*."

On the expiration of this notice the club took possession of the materials, implements, and plant.

At the adjourned first meeting of the creditors on the 26th of June *Buckley* was appointed trustee. He afterwards attempted to remove the debtor's plant, implements, and effects from the works, but was prevented from doing so by *Rhodes*, and men under his orders.

On the 5th of July, 1876, the trustees of the building club gave notice of motion in the County Court for an order to restrain the trustee in the liquidation from interfering with or taking possession of the plant, materials, and implements on the premises belonging to the society, and for an order that he should deliver up possession to them of all such plant, materials, and implements as he had already seized, and for payment of damages. An interim injunction was granted on the 11th of July. Before the motion came on to be heard *Buckley* had died, and *Henry Dickin* had been appointed trustee in his place. On the 13th of October the in-

junction was made perpetual, and an inquiry as to damages was ordered (1). The trustee appealed.

De Gex, Q.C., and *Robertson Griffiths*, for the Appellant :—

Clause 6 in the contract gave the building society a mere

(1) The JUDGE (Mr. *Daniel*, Q.C.), in giving his judgment, said :—

The whole case turns upon the proper interpretation of the 6th clause of the contract, which gives the license to seize and detain the materials, plant, and implements. I have referred to the authorities which were cited before me, particularly the cases of *Brown* v. *Bateman* (Law Rep. 2 C. P. 272) and *Reeve* v. *Whitmore* (4 D. J. & S. 1), and I take the law to be this, that where there has been a change of interest preceding the exercise of the rights which the license to seize gave, then the license cannot be exercised to the prejudice of the party who has obtained a title through that change of interest. The argument on the part of the trustee was this : His title relates back to the act of bankruptcy committed when the petition for liquidation was filed, and the seizure was not made until after that act of bankruptcy had been committed, and therefore not until after the title to the goods was vested in the trustee. I am not able to find in the cases to which I have referred that the Court has been called upon to consider the question, What is the effect of a license properly exercised before there has been a complete actual change of ownership? In this case I take it to be perfectly clear that the mere filing of the petition did not change the title. The property was still vested in the debtors, and, it remaining so vested in them, the license, being duly exercised after proper notice had been given, was exercised at a time when the debtors still remained actual owners of the property. I am of opinion that the title of the trustee subsequently created by his subsequent appointment, though it does relate back to the time when the petition was presented, yet relates back in such a way as not to render illegal or inoperative the lawful act which was done by the licensee at a time when the trustee's title did not exist. It is possible that, notwithstanding the petition for liquidation, there might have been a creditors' meeting at which the creditors might have refused to assent to a liquidation by arrangement, or the debtor might have proposed a composition to his creditors which they might have accepted, and thus have left him master of the materials and plant. I think the authorities to which I have been referred shew that the license could not be exercised after there had been a change of ownership, but that rule is confined to cases in which a change has been actually effected. I am the more confirmed in this view by considering that, if that had not been the law, the contract in the present case would have been insensible and inoperative from the very commencement. The parties must have intended that, in the event of the bankruptcy or insolvency of the contractor, the proprietors should be entitled to exercise their license during the period in which it has been actually exercised. In the case of *Brown* v. *Bateman* the conclusion come to upon consideration of the

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license to seize; it did not operate as an equitable assignment: *Reeve* v. *Whitmore* (1). The building society had no estate in the materials and plant until they actually seized under the license. The license could only authorize the seizure of that which was the property of the licensors, and before the seizure was made the title of the trustee, which on his appointment related back to the filing of the petition, *Ex parte Duignan* (2), had intervened, and no valid seizure could be made. The title of the trustee by relation back avoids all dealings with the debtor's property subsequent to the filing of the petition, unless they come within the protection of sect. 94 or sect. 95. Those clauses cannot extend to the exercise of a mere license to seize, for that amounts not to the completion of an inchoate title, but to the creation of a new one. *Brown* v. *Bateman* (3) was quite a different case, for the agreement was that the materials when brought upon the land should be *ipso facto* considered as attached to the land. That operated as an equitable assignment. In *Krehl* v. *Great Central Gas Consumers Company* (4), where a guarantee society had power, in case they should be called upon to make any payment under their guarantee, to seize and sell the goods of the person whose fidelity they had guaranteed, it was held that a seizure made by them, without notice of an act of bankruptcy previously committed by him, was good as against his assignees in bankruptcy. But the judgments of the Court clearly imply that, if there had been notice of the act of bankruptcy, the title of the trustee would have prevailed. In the present case the affidavit of *Rhodes*, stating his readiness to act as receiver under the petition,

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contract was that the plant and materials which were brought on to the ground were to be considered as attached to the land, and it was held that they were properly vested in the parties who had exercised their right of taking possession. In the present case there is a provision that, if the license be properly exercised, the licensees may take possession of the materials and plant, and their architect may either use them in completing the works, or may sell them and apply the proceeds to the completion of the works. I think, therefore, that the proprietors of the club are entitled to what they ask, and an order must be made restraining the trustee from taking such things as may properly be called materials and plant.

(1) 4 D. J. & S. 1.

(2) Law Rep. 6 Ch. 605.

(3) Ibid. 2 C. P. 272.

(4) Ibid. 5 Ex. 289.

leads to the necessary implication that he was aware of the filing of the petition, and this was before the seizure was made.

Winslow, Q.C., and *West*, for the building club :—

By sect. 23 of the *Bankruptcy Act*, 1869, the trustee of a bankrupt has power to disclaim contracts entered into by the bankrupt, and if he does so, the disclaimed contract is to be deemed to be determined from the date of the order of adjudication. By sect. 125, sub-sect. 7, the appointment of a trustee in a liquidation is to be deemed to be equivalent to an order of adjudication in bankruptcy. No power is given to the trustee to impeach a title which has been perfected between the filing of the petition and his own appointment. The other party to the contract is not to have his hands tied during the whole period between the filing of the petition and the adjudication or the appointment of the trustee. The provisions of the contract must remain in full force up to the appointment of the trustee. In *Brown* v. *Bateman* the license was to seize upon the land of another person ; and it in no way shews that a license to seize cannot create an equitable interest before the seizure. In the present case the land is the property of the club, and, therefore, *primâ facie* the materials on the land belong to them. They have, in fact, been paid for by them. A license to retain goods found on our own land amounts to an equitable assignment. *Reeve* v. *Whitmore* (1) turned upon the peculiar wording of the agreement in that case. *Wood* v. *Leadbitter* (2) shews what is the legal effect of a license, and the judgment of *Alderson*, B., shews that it may create an equitable interest. In *Hawthorn* v. *Newcastle, &c., Railway Company* (3) it was held that a contract very similar to the present one was valid, not having been made in contemplation of bankruptcy.

If in the present case the property in the materials and plant vested in the trustee at all, it did so by virtue of a valid contract which he could not disclaim or alter in any way prior to the date of his appointment. And if the question of notice of the act of bankruptcy be material, there is nothing to shew that the club had any notice of it before the seizure.

(1) 4 D. J. & S. 1. (2) 13 M. & W. 838.
(3) 3 Q. B. 734.

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De Gex, in reply:—

The onus of shewing that they had no notice of the act of bankruptcy lies on the Appellants: *Ex parte Schulte* (1); *Pearson* v. *Graham* (2). They have not shewn this; on the contrary, I say that the evidence proves they had notice. In *Wood* v. *Leadbitter* (3) the ground of the decision was that there had been no license by deed. The license in the present case was not a license to enter upon land, but only to seize personal chattels, which need not be by deed. It is immaterial to whom the land belongs. It might be contended that the license ought to have been registered under the *Bills of Sale Act*. Sect. 23 of the *Bankruptcy Act* has no application. The simple question is, does the contract amount to an equitable assignment, or is it only a license to seize? Did the property in the materials pass to the club as soon as they were brought upon the land, or was a further act on their part necessary? A license to enter upon land may be coupled with an interest; a license to seize goods cannot. In *Hawthorn* v. *Newcastle, &c., Railway Company* (4), an actual charge or lien was created. The contract in the present case is an unlawful one, for it is an attempt to alter the legal destination of property in the event of bankruptcy: *Ex parte Mackay* (5).

Judgment.

BACON, C.J.:—

No doubt the ground upon which the learned Judge of the County Court decided this case presents some difficulties, because by the bankruptcy law the filing of the petition is an act of bankruptcy, and that the title of the trustee relates back to the act of bankruptcy cannot in general be disputed. But I do not think that is all that the learned Judge meant to decide. He had before him the contract containing the license about which so much has been said. If that was a valid contract, and if the license there granted was unimpeachable, it does not signify to what time the trustee's title related back.

There is a little obscurity with regard to the title of the trustee arising from the circumstance that in this Act of Parliament (which

(1) Law Rep. 9 Ch. 409.
(2) 6 A. & E. 899.
(3) 13 M. & W. 838.
(4) 3 Q. B. 734.
(5) Law Rep. 8 Ch. 643.

is not the best drawn Act I have seen) sometimes the title of the trustee is said to date from the adjudication and sometimes it is left to be implied that it extends to the act of bankruptcy. The 7th sub-section of the 125th section somewhat mixes these things together. [His Lordship read sect. 125, sub-sect. 7.] The case, as I have said, arises upon this contract, which contains, in the events that have happened, a license to seize. Well, unless it can be imputed to that contract that it was in itself invalid,—unless the persons entering into it were told that an act of bankruptcy had been committed,—it is a perfectly good contract, reasonable in its terms, and of very ordinary occurrence in such like transactions. [His Lordship read clause 6 of the contract.] That contract was entered into in December, 1874, before any suggestion of any act of bankruptcy.

Now, is not that a valid transaction between the parties? If so, by the *Bankruptcy Act* all valid transactions are unimpeachable in bankruptcy if they take place before the date of the order of adjudication. Sect. 94 says that nothing in the Act contained shall render invalid "any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication." Admitting the *dictum* in *Ex parte Schulte* (1) (which, if it were necessary to decide the case, would require some further consideration), that when it is alleged that the transaction took place before notice of an act of bankruptcy the onus is upon the person sustaining the transaction to prove that he had no notice of an act of bankruptcy, in the present case the matter is left in some obscurity, but the only attempt to prove that, at the time when notice of their intention to exercise the license to seize was given, the society had notice of the act of bankruptcy, has been by means of an affidavit made by one of their officers, in which he says he is willing to become receiver. But that does not go beyond intention, it does not establish the fact even that the petition had been then filed, although it happens to have been made on the very day on which it was filed. But however that may be, it does not

(1) Law Rep. 9 Ch. 409.

C. J. B. 1876 *In re* WAUGH. *Ex parte* DICKIN. Judgment.

matter, because the transaction really took place at the date of the contract which was made in December, 1874.

The case of *Krehl* v. *Great Central Gas Consumers Company* (1), to which Mr. *Robertson Griffiths* has referred, seems to me to be applicable to this part of the case. That was a case where a society had given a guarantee for the honest conduct of a person employed, and had reserved power, if certain events happened, to seize on his goods. Those events happened, and they did seize, and he became a bankrupt. In the course of the argument in that case Mr. Baron *Martin* referred to the word "transaction" used in sect. 133 of the Act of 1849, with which the Court were then dealing (and, in my opinion, the words in the present statute are equivalent to the words in that statute), and he said: "The 'transaction' ought not to be confined to the act of entering to seize the goods. It includes the whole arrangement between the parties from the contract by *Higgs* with the Guarantee Society downwards." And the same principle was adverted to by the other Judges. The Chief Baron said: "It seems to me quite immaterial whether the goods were the bankrupt's own, or merely in his 'order and disposition,' or whether he was actually a party to the seizure or not. I am of opinion the 'transaction' was protected within the letter and spirit of the statute; and, accordingly, that judgment should be for the Defendants." The other judgments are to the same effect, and I do not think it is necessary to read them.

Well, then, under these circumstances, this fact is clear, that very shortly after the filing of the petition the society put in force the license contained in this contract, which was made in 1874; that they had a right to do so cannot be questioned, as they were acting in the exercise of a power which this contractor gave to them long before he was a bankrupt, and probably before there was any thought of his being a bankrupt.

The case of *Hawthorn* v. *Newcastle, &c., Railway Company* (2) which has been referred to seems to me to cover this case, and more than cover it. It is said by Mr. *De Gex* that there there was a stipulation for a lien. I cannot read this contract, considering the time at which it was entered into, as being anything

(1) Law Rep. 5 Ex. 289, 291. (2) 3 Q. B. 734.

C. J. B. 1876 *In re* WAUGH. *Ex parte* DICKIN. Judgment.

less than a contract for a lien, if the event should happen upon which it was stipulated that the society should have full power to seize and retain all materials, plant and implements.

Without, therefore, disturbing the judgment of the learned Judge—without saying whether or not the order that he made was justified to its full extent by there not having been a change of property, I think that upon the clear terms of this contract—a contract unimpeachable notwithstanding the later bankruptcy, notwithstanding the fact that the seizure was made after the petition for liquidation was filed—this was a transaction which was protected, or, at any rate, perfectly lawful and unimpeachable in the bankruptcy, that the seizure has been lawfully made, and that the society are entitled to the benefit of their contract. The appeal will be dismissed with costs.

Solicitors for Trustee: *H. B. Clarke & Son,* agents for *Terry & Robinson, Bradford.*

Solicitors for Building Club: *Singleton & Tattershall,* agents for *Senior & Wilson, Bradford.*

In re CAUGHEY. *Ex parte* CAUGHEY.

C. J. B. 1877 *Jan.* 15.

Undischarged Debtor—Second Liquidation Petition—Discharge granted on Payment of Specified Sum to Trustee as the Purchase-money of the Estate—Money claimed by Trustee under First Liquidation—Rights of Trustee under Second Liquidation—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

An undischarged debtor went into business again, and afterwards filed a second liquidation petition. His creditors, old and new, empowered the trustee to sell the debtor's estate to him for £475, upon payment of which sum he was to be entitled to his discharge. The money was paid, and was then claimed by the trustee under the first liquidation. The Court decided in favour of that claim. The second trustee thereupon claimed the debtor's stock-in-trade and effects:—

Held (reversing the decision of the County Court Judge), that the debtor, having paid the £475, was free from the claims of all his creditors, and was entitled to retain whatever property he had acquired.

Statement.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

C. J. B.
1877
In re CAUGHEY.
Ex parte CAUGHEY.
Statement.

W. F. Caughey and *H. H. Caughey* carried on business in partnership. On the 6th of July, 1870, they filed a liquidation petition. The creditors resolved upon a liquidation by arrangement, and appointed *T. W. Read* trustee. They also resolved that the debtors should be entitled to their discharge when the creditors should have received 2*s.* in the pound. The estate did not realize more than 11*d.* in the pound. No resolution was passed to close the liquidation. *W. F. Caughey* commenced business again by himself. On the 3rd of August, 1873, he filed a liquidation petition. All his creditors, both those whose debts were contracted before, as well as those whose debts were contracted after, the filing of the joint petition, were summoned to the first meeting, which was held on the 21st of August, 1873. It was then resolved that the debtor's affairs should be liquidated by arrangement, and *A. L. Ford* was appointed trustee. It was also resolved that the trustee should be empowered to sell the debtor's estate to him for the sum of £475, to be paid in three instalments at specified dates, and that on payment of these several instalments the debtor should be entitled to his discharge. The instalments were duly paid by the debtor to *Ford*, and the debtor's estate was given up to him. The trustee under the joint liquidation claimed the £475 from *Ford*, and it was decided by the Court of Appeal that this claim was well founded to the extent necessary to make up the 2*s.* in the pound to the creditors under the first petition; *Ex parte Ford* (1). The £475 was then handed over by *Ford* to the trustee in the first liquidation. The debtor continued to carry on his business, and in October, 1876, *Ford* applied to the County Court for an order declaring that the goods then in the debtor's possession were the property of *Ford* as trustee, and that the debtor should deliver them up to him accordingly. The Judge made the order asked for. The debtor appealed.

Argument.

Finlay Knight, for the Appellant:—

A bargain was entered into between the debtor and all his creditors that he should have his discharge when he had paid the £475.

(1) 1 Ch. D. 521.

He has done this, and he is therefore now free from all their claims. He has nothing to do with the dispute between the two trustees as to the appropriation of the money. He is in exactly the same position as a stranger would have been who had bought the estate. It cannot be right that he should have to pay the money twice over: *Ex parte Tinker* (1).

Argument.

H. Inglis Richmond, for the second trustee:—

The money which the debtor paid to the trustee under the second liquidation represented property which was not his own, but which belonged to the trustee under the first liquidation. Therefore the bargain entered into with the creditors under the second liquidation has not been fulfilled, and the debtor is not entitled to his discharge. Consequently, whatever property he has belongs to the second trustee: *Bankruptcy Act*, 1869, s. 15.

Judgment.

BACON, C.J.:—

As a matter of principle, I cannot agree with the Judge of the County Court. The £475 was paid to and received by the trustee in the second liquidation. The trustee in the first liquidation claimed it, and under the order of the Court he obtained it from the second trustee. If there had been any surplus after paying the creditors under the first liquidation what remained due to them, that surplus would have gone back to the trustee under the second liquidation. Under the second petition it was resolved that the debtor's affairs should be liquidated by arrangement. At the meeting, all the creditors he had in the world, both the old and the new creditors, concurred in an agreement that his estate should be sold to him for the sum of £475, which was to be paid in three instalments, and that upon payment of these instalments he should be discharged from all his debts. That was the agreement. He paid the £475, and upon that he became entitled to his discharge from all his debts, both old and new. Then there arose a question between the first trustee and the second trustee which of them was entitled to the money. That was not a question with which the

(1) Law Rep. 9 Ch. 716.

C. J. B. 1877 *In re* CAUGHEY. *Ex parte* CAUGHEY. Judgment.

debtor had anything to do, for he had paid the £475 in satisfaction of all his debts. The money was claimed by the first trustee, and the Court decided in his favour, that is to say, that the money was to be employed, in the first instance, in paying the old creditors. That was all. It was not a decision that the agreement between the debtor and his creditor was in any respect invalid. After the resolution of the creditors and the performance by the debtor of his part of the agreement, no one could sue him for a single debt. How could it signify to him what were the rights of the two sets of creditors *inter se?* If he was in fact discharged, he is protected from the claims of all his creditors. What has happened since to alter their rights? In my opinion the creditors, old and new, have had all that they bargained for in exchange for the discharge which they gave to the debtor. Looking at the honesty of the transaction, as well as at the law, it is impossible to say that, because it has been decided that, according to law, the £475 must be administered in a particular way, therefore the debtor is still responsible for that sum, which he has in fact paid. The order of the County Court must be discharged with costs.

Solicitor for Appellant: *W. W. Wynne*, agent for *T. & T. Martin, Liverpool.*

Solicitor for Trustee: *W. Pierce, Liverpool.*

LACEY *v.* HILL.

[1870 L. 94.]

LENEY *v.* HILL.

[1870 L. 93.]

C. A.
1876
M. R.
July 6, 11.
C. A.
Aug. 4;
Nov. 8.

Bankruptcy—Concealed Overdrawing by Partner—Proof on behalf of Joint against Separate Estate.

H., a banker, took into partnership *K.*, a country gentleman unacquainted with banking, who was not bound to bring in any capital or to attend to the business. *K.* did not acquaint himself with the accounts, though he occasionally came to the bank. *H.* from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the *Stock Exchange*, concealing the overdrawings by means of fictitious entries in the books of the bank. *K.* never drew out anything. On the death of *H.* the bank was found utterly insolvent, and *K.* was adjudicated bankrupt. A decree was made for the administration of the estate of *H.*, under which the trustee in bankruptcy of *K.* claimed to prove for what was due from *H.* for moneys thus fraudulently drawn out:—

Held, by the Court of Appeal (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.), affirming the decision of the Master of the Rolls, that he was entitled to prove:

Held, further, that the rule in *Clayton's Case* (1) could not be applied to fraudulent overdrawings.

Statement.

THIS was a summons by the trustee in bankruptcy of Messrs. *Kerrison*, the surviving partners of a firm of *Harvey & Hudson*, bankers at *Norwich*, claiming to prove against the separate estate of Sir *Robert Harvey*, deceased, a former partner in the firm, for £635,000, alleged to have been improperly taken by him out of the funds of the bank.

In June, 1860, Sir *Robert Harvey* (then Mr. *Harvey*) was carrying on the bank by himself, and proposed to Mr. *Kerrison*, sen., a country gentleman unacquainted with the business of banking, to join him in partnership. The partnership commenced on the 18th of June, 1860. The articles contained clauses against overdrawings and a provision for an annual stocktaking. Mr. *Kerrison* was to receive one-fifth of the profits, or if that share in any year was

(1) 1 Mer. 585.

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less than £1000 then £1000, but was not bound to bring in any capital nor attend to the business of the firm. In practice he attended at the bank on Saturdays, but did not examine the accounts. A son of Mr. *Kerrison* joined the firm in 1867, but no change took place in the conduct of the business. During the continuance of the partnership Sir *R. Harvey*, who managed the business, regularly made out balance-sheets which shewed a considerable profit.

On the 19th of July, 1870, Sir *Robert Harvey* committed suicide. The next day the bank stopped payment, and it was then discovered that Sir *R. Harvey* had lost enormous sums through speculations on the *Stock Exchange*, and that during the continuance of the partnership he had been in the habit of drawing out large sums from the bank, with some of which he debited his own private account in the books of the bank, but for the most part, when a sum of money was thus drawn out and paid to any person on Sir *R. Harvey's* private account, he opened a fictitious account in the books, treating the person who had received the money as a debtor to the firm for that amount, and carried on the account in due form, charging the imaginary debtor with interest, and crediting him with interest as having been paid. In other cases Sir *R. Harvey* received moneys due to the firm and applied them to his own use, but never made any entry in the books of their having been received, leaving the person who paid standing in the bank books as a debtor. He also on various occasions drew bills on different firms, forged acceptances to them, entered them in the books as having been discounted by the bank, and carried the proceeds to his own account, or to one of the fictitious accounts, and afterwards removed the bills from the bank, though they were left standing in the books as being assets of the bank. The result of these proceedings was, that the bank was utterly insolvent, and the *Kerrisons*, who had drawn out nothing, but had allowed their imaginary shares of profits to remain in the business, were adjudicated bankrupts.

In the same year, 1870, a decree was made at the suit of creditors for the administration of Sir *R. Harvey's* estate. In 1873 the trustee under the *Kerrisons'* bankruptcy brought in a claim for £323,525 16*s.* 1*d.*, and liberty was given to a person representing

a number of stockbrokers, who were the principal separate creditors of Sir *R. Harvey*, to attend the proceedings. In December, 1874 the trustee obtained leave to bring in a further claim, and accordingly brought in one for £311,000, being the amount taken from the bank by means of the forged acceptances, making together with the former £635,525 16*s.* 1*d.*

Statement.

The separate creditors had received a dividend of 6*s.* 8*d.* in the pound on their debts, a sum being reserved sufficient to pay a dividend at the same rate on the £323,525 if established. The state of the assets was such that if the two claims of the trustee were allowed at anything near their full amount, the separate creditors would never receive anything more. After an elaborate investigation of the accounts in Chambers, the claims were adjourned into Court.

The case came on for hearing before the Master of the Rolls on the 6th of July, 1876.

Argument.

Southgate, Q.C., *Fry*, Q.C., and *Cozens-Hardy*, in support of the claims, referred to *Ex parte Smith* (1), *Ex parte Harris* (2), *Ex parte Yonge* (3), and *Ex parte Lodge* (4).

They were stopped by the Court.

Joseph Brown, Q.C., and *Romer*, for the Plaintiffs:—

The trustee in bankruptcy of Messrs. *Kerrison* has no right of proof against Sir *Robert Harvey's* separate estate. All the capital of the bank was brought in by Sir *R. Harvey*; it follows that the amount which he overdrew from the bank is attributable to the amount of capital which he brought into the firm. Further, the course of conduct pursued by Sir *R. Harvey* must be taken to have been acquiesced in by Mr. *Kerrison*, sen. It appears that in two half years, in 1863 and 1864, he knew from the accounts that sums had been withdrawn from the partnership, although they were subsequently repaid. That knowledge on his part must be taken to amount to consent to other and larger withdrawals on the part of Sir *R. Harvey*, and to a waiver of the clause against overdrawing contained in the articles of partnership.

(1) 1 Gly. & J. 74; 6 Madd. 2.
(2) 2 V. & B. 210.
(3) 3 V. & B. 31.
(4) 1 Ves. 166.

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Even if Mr. *Kerrison* and his son had no actual knowledge of Sir *R. Harvey's* dealings with the partnership moneys, they had constructive notice. The father was aware of and sanctioned the appointment of Mr. *Hill* as bank manager when the partnership was formed; he also knew of the appointment of Mr. *Richardson*, who was under Mr. *Hill*, and of the bill clerks. These persons knew, or might have known, of the overdrawings, and their knowledge must be imputed to Messrs. *Kerrison*: *Ex parte Ford* (1). The manager and clerks were agents of the firm, and notice to them was notice to all the partners.

Moreover, supposing Messrs. *Kerrison* cannot be fixed with knowledge or constructive notice, still they were guilty of such gross laches in not properly investigating the accounts as to disentitle the estate to any right of proof. The laches on their part was the cause of the stockbrokers continuing to give credit to Sir *R. Harvey*, which they would not have done if they had interfered; thus their loss might have been lessened.

We contend that further time ought to be allowed for the investigation of the accounts.

Merewether, for the Defendant.

Benjamin, Q.C., *Davey*, Q.C., *B. B. Rogers*, and *Dundas Gardiner*, for the representative of the *Stock Exchange* creditors:—

The rule on which the claim is based, namely, that where one partner abstracts money from the joint estate the joint estate may prove against the separate estate of the partner for the amount abstracted, applies to those cases in which the separate estate is increased by the amount abstracted, so as to disturb the equities between the estates; but it does not apply to cases where, as here, the amount abstracted is squandered without increasing the separate debt: *Fordyce's Case* (2); *Ex parte Grill* (3). The case of *Ex parte Harris* (4), properly understood, does not support the claim which is here made.

(1) 1 Ch. D. 521.
(2) Cooke's Bankruptcy Law, 8th Ed. p. 531.
(3) Cooke's Bankruptcy Law, 8th Ed. p. 530.
(4) 2 V. & B. 210.

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JESSEL, M.R.:—

This case, apart from the magnitude of the amount claimed and from the painful circumstances connected with the great fraud committed by the deceased baronet Sir *Robert Harvey*, is one of a very ordinary description, not presenting to my mind any difficulties of law or of fact. I will state shortly the nature of the case.

In June 1860 Sir *Robert Harvey*, being then Mr. *Harvey*, was carrying on business alone as a banker. It is at least doubtful whether he was solvent at that time, at any rate there is no doubt that the large capital which nominally stood to his credit was not real. However, being apparently the owner of considerable capital, he takes in (I am sorry to say I use the words "takes in" in the sense of deception as well as in that of allowing to enter) Mr. *Kerrison*, a country gentleman of considerable property, who appears then to have had no knowledge of banking, and who was not to bring in any capital. On the 18th of June the partnership began between Mr. *Harvey* and Mr. *Kerrison*. The articles of partnership contained the usual clause against overdrawings, and one providing for annual stock takings, and it was agreed that Mr. *Kerrison* was not to be bound to attend to the business of the bank. He did, in fact, go every Saturday and take some part in the business of the bank, but he neither looked at the books nor made those inquiries which probably a man of business would have made, and which, I think, if made by a competent man of business, might have put a stop to these frightful frauds. He was entirely ignorant of the mode in which Sir *Robert Harvey* conducted, or rather misconducted, the business from 1860 till the time of his death in 1870.

Soon after the partnership Sir *Robert Harvey* began, or continued, speculations on the *Stock Exchange*, and lost very large sums of money, and the way in which he paid these sums was that of stealing the money from the bank. I adopt Lord *Eldon's* expression—"he took the money out of the bank coffers and paid it to the stockbrokers." He sometimes drew out the money by debiting his private account first with an advance; he sometimes drew out the money by entering a fictitious credit in the books, often entering as a borrower the name of the broker to whom he paid the money, often entering fictitious names; some-

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times he overdrew his private account and then forged bills, often in the name of non-existing firms, and he covered the advances to his private account by crediting that account with the forged bills and putting the forged bills into the till of the firm. On other occasions he simply opened fictitious credits in the books, debiting these amounts to persons who had never borrowed money, but who in fact had been his creditors, and in this way he drew out sums to the extent of hundreds of thousands of pounds in the whole, running over seven or eight years. Of course the eventual result must have been foreseen. The crash came at last in 1870, and Sir *R. Harvey* withdrew himself from earthly justice, at all events, by committing suicide. Mr. *Kerrison*, who had never drawn a farthing out of the firm in any way, but who had shewn his thorough confidence in Sir *R. Harvey*, not only by leaving his supposed profits there (the accounts shewed profits, although it was not so, but he thought there were), but by paying money into the firm, was utterly ruined and made a bankrupt.

The real question I have now to decide is one in which Mr. *Kerrison* is not at all interested, because his estate is insolvent. It is a question between what is called the joint estate—that is, the estate of the firm of *Harvey & Kerrison*—and the separate estate, that is, the estate of Sir *R. Harvey*. When I say between the two estates, of course that is nominal. The real question is between the creditors of the two estates, that is, the depositors of the bank on the one side, and the stockbrokers who conducted Sir *R. Harvey's* speculations on the other side. They are substantially the people who are contesting the question. It arises in this way: Sir *R. Harvey* being dead, his estate is being administered in this Court; Mr. *Kerrison* being a bankrupt, his estate is being administered in the Court of Bankruptcy, and the trustee of Mr. *Kerrison's* estate brings in this proof on behalf of what I call the joint estate against the separate estate of Sir *R. Harvey*, which is being administered in this Court, and it is admitted, and it could not be disputed, that it must be administered upon the same principles as if Sir *R. Harvey* had lived and had been made a bankrupt together with Mr. *Kerrison*. The real question, therefore, is, whether or not it is a case in which what is called the joint estate can prove in bankruptcy against the separate estate?

Now, grosser cases of fraud I never saw. They are not only legal but moral frauds. The whole of these transactions took place on the part of Sir *R. Harvey*, with a view, no doubt, of cheating his partner. These accounts were made up in a way which was intended to deceive his partner, and probably intended to deceive, as far as he could, the clerks in the establishment also. No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit; and therefore one cannot doubt for a moment that Sir *R. Harvey* was perfectly well aware he was committing these frauds, and committing them in the hope (as one often sees) that some successful speculation or other would put him in funds and enable him to pay off these large defalcations, and set himself right once more before the world.

Now the character of the transaction, as I said before, can only be described as simply stealing. It is not necessary, however, as I understand the rules of bankruptcy, to put the case quite so high —it is not necessary for the joint estate to prove more than in the words of Lord *Eldon* (*Ex parte Harris* (1)), "that this overdrawing was for private purposes and without the knowledge, consent, privity, or subsequent approbation of the other" partners. If that is shewn, it is *primâ facie* a fraudulent appropriation within the rule. Lord *Eldon* further says: "It is as much a fraud within Lord *Thurlow's* rule as if, according to the expression I am informed I formerly used, he had stolen the property." In this case there was intentional fraud, though in a few exceptional cases there are overdrawings which do not amount to actual stealing; but with those few exceptions there can be no doubt that is the appropriate description of the transaction. That being so, and the Plaintiffs having proved all this, they carry in a claim for the amounts so appropriated, giving credit for the amounts repaid. The accounts have been investigated in my Chambers for a very long period. Accountants of eminence, experience, and skill, have been employed on both sides, and time has been allowed under circumstances which I am going to mention—a very long time—to investigate these accounts; and the result is, as far as I am concerned, I see no necessity for taking any further accounts.

(1) 2 V. & B. 214.

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[His Lordship then discussed the course of proceeding in taking the accounts.]

That Sir *R. Harvey's* estate would be liable in equity to make good the amount, I do not think any one can doubt. If he had been alive, a bill might have been filed against him, or an action I should say now, brought by his partner, compelling him to restore back to the partnership funds the sums he had unlawfully abstracted from them. In the same way, if he had become bankrupt, there is no doubt that a proof might have been made against him under the principle laid down by Lord *Eldon*, and, both being bankrupt, by the joint estate, for the sum so appropriated. Why is the proof not to be allowed?

I am told, first of all, that the principle of these cases, which is plainly stated in *Ex parte Harris* (1), was wholly misunderstood, and that you could not prove on behalf of the joint estate unless you had shewn that the separate estate had been increased by the sums misappropriated.

Now, there is a little fallacy, as it appears to me, in that proposition, state it how you will. What is the meaning of the separate estate being increased? A man's separate estate is increased by what money he puts into his pocket, and, therefore, the moment an individual partner abstracts the money of the partnership and puts it into his pocket for private purposes, it must be, as Lord *Eldon* puts it (2), "for the increase of the individual's estate." If that was the meaning of the proposition, it was correct. It is not because he makes the partnership liable by his wrongful act, which was one of the two branches of *Fordyce's Case* (3); but it is because he has appropriated the property or money of the partnership to his individual use that his separate estate is liable.

But the argument used before me was this: that you must shew that some of the property remained to the benefit of the partner's private estate, and that if he gambled away the money the moment he got it, or paid it away for some other purpose, so that the private estate did not get any benefit eventually, you could not prove against the separate estate. I can find no trace of any such doctrine. It is contrary to what Lord *Eldon* says, and contrary

(1) 2 V. & B. 210.
(2) Ibid. 214.
(3) Cooke's Bankruptcy Law, 8th Ed. p. 531.

to good sense and principle, because the man who has misappropriated this money, or taken it away from the firm, and has applied it in payment of any debt due from him, whether a debt (so called) of honour, or a legal debt—to the extent he so pays it, thereby relieves the rest of his property. If in the case which actually occurred, when Sir *Robert Harvey* was called upon to pay £30,000 or £40,000 for stock he had purchased, he had taken his deeds to his bankers and had pledged them and raised money upon them, and had paid the money in that way, he would have made his real estate liable to repay it, in case he had become bankrupt, and to that extent he would have diminished his private or separate estate. If instead of doing that he took the money out of the bank, that in the same way increased his separate estate by the amount he so took; because it left the landed estate unincumbered instead of being incumbered to that amount. So that, taken in that way, the private estate is increased. I will go further, and I say on the authorities, if a man steals £100,000 and appropriates it to gambling debts, as Lord *Eldon* says, that increases his private estate, and it is quite immaterial that the other private estate is in exactly the same position as it was before; there is no distinction when you come to prove. There would be a distinction if you came to a question of following the property which is very material. If instead of the money having been spent you could shew, what I suppose happens very seldom, that the man who stole the money invested it in property, and you could identify the property, that would not be a case of proof at all; it would be a case of restoration. You would take away the property from the private estate and put it into the joint estate; you would follow the property under the well-known rule in equity, you would trace the firm property into the form of an investment, and the firm would take it away altogether. You would not prove. The doctrine of proof assumes that the property now no longer remains in specie; that it cannot be followed or identified; and that is the reason why you can only prove and not take the property back again.

The whole foundation of the doctrine of proof in these cases rests upon this, that in a Court of Equity for many purposes the joint estate is treated as a distinct estate, in the same way as you

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can compel a partner, if not a bankrupt, to restore funds misappropriated by repaying them to the firm account, so that, when the partner is bankrupt, proof can be tendered on behalf of his estate for the sum taken.

That, I think, disposes of the chief argument presented to me on behalf of the *Stock Exchange* creditors. The argument presented to me on behalf of the Plaintiff was of a different character. It was said, first of all, that the drawing of Sir *R. Harvey* might be attributed to his capital brought in. That, however, would be no defence if he had brought in any capital; and I do not think, on the evidence, that he did. But supposing he had capital, by the partnership articles he had no right to draw it out; and if a partner, although he has some capital to his credit, takes away against the partnership articles money which he appropriates to his own use, the firm has a right to have it brought back again, and it is quite immaterial that the actual capital was taken. It might be material when you were discussing the question of moral fraud whether a man took what was really his own or somebody else's property; but, looking at it in a legal point of view, it is an appropriation contrary to the condition expressed or implied in the partnership articles that the capital is to remain for the joint benefit of himself and the partnership. It is quite as much contrary to the partnership articles for him to draw out a sum not exceeding that capital as if he were to draw out a sum exceeding that capital.

The next point taken was this: It was said that if the breach of faith has been acquiesced in by the co-partner, you cannot prove. I agree, if one partner has stolen the partnership property, and the other partner knows it and consents to his retaining it, you cannot prove. It is then an ordinary debt, for which no proof can be allowed. If that is the sense in which acquiescence is used, then I say if he has acquiesced the proof is barred. Acquiescence really means a standing by with knowledge of your right, as it is said, both in fact and law. In order, therefore, to make out acquiescence in that sense you must make out knowledge on the part of the co-partner, and then that he stood by and allowed the state of affairs to continue without remonstrance.

Now, first of all, what did Mr. *Kerrison* know? He says that

he knew nothing of these frauds. He did know on two occasions, on two half-years, in 1863 and 1864, that Sir *R. Harvey* had drawn out some moderate amounts compared to the large amounts we are now speaking of; but he also knew, from the subsequent accounts, that it was alleged or represented to him, and he believed that those sums had been repaid. It was suggested that that alone would authorize Sir *R. Harvey* to overdraw any amount he thought fit to appropriate to his own use. I entirely dissent from any such proposition. You may, no doubt, waive partnership articles, either by actual waiver—that is, a waiver in so many terms, by a new contract made in writing, or by parol, or by conduct; that is, a certain state of circumstances having occurred contrary to the partnership articles known to all the partners and long suffered by them to continue with such knowledge, may authorize a Court of Justice to infer an actual contract that that shall be the new state of things, and to that extent the articles are waived or altered. But that must depend upon circumstances. You must not assume from a course of conduct anything absolutely irrational and absurd. The mere fact that the partner has been allowed by his co-partner, contrary to the partnership articles, to overdraw his account on two occasions would not imply anything so absurd as that he was to be allowed to overdraw it to any extent and whenever he liked; *à fortiori*, when we find that soon afterwards he restored, or appeared to restore, the amount overdrawn, and that no further overdrawing was known to have taken place. It appears to me that would not be a fair inference at all from what occurred, and, therefore, you cannot impute to Mr. *Kerrison* any license whatever to Sir *R. Harvey* to overdraw the account in the way he did. But it must be recollected that the element of knowledge is wanting as regards the actual overdrawings beyond these two, and he certainly did not acquiesce in them.

But it is said, though he did not know anything about these frauds, still he had constructive notice that these frauds were going on. First of all, I am not aware that constructive notice will do. None of the authorities which have been cited to me say it will do. The words of Lord *Eldon* are—he uses four words where probably fewer would have done—"knowledge, consent, privity or subsequent approbation." Now, he has had neither knowledge,

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consent, nor privity; because he did not know of it at the time, and the only other words that can be relied on are "subsequent approbation." But constructive notice is not subsequent approbation. You cannot have subsequent approbation without knowledge. Therefore I do not see how it would avail even if it were proved. But the supposed constructive notice was of the most singular kind. What occurred was this: there was a person of the name of *Hill* who was what they called manager of the bank; he was appointed by Sir *R. Harvey*. His appointment was known to Mr. *Kerrison*, who consented to the appointment on the formation of the partnership. There was a person of the name of *Richardson*, who seems to have been next in order in the hierarchy of the bank to Mr. *Hill;* and there were some other clerks, notably bill clerks. It is said that one or more of these persons knew of the frauds that Sir *R. Harvey* was committing, and that if they did know, their knowledge is to be imputed constructively to Mr. *Kerrison*, and, as they must have known it for a long time, their knowledge therefore is to be imputed to Mr. *Kerrison* for a long time, and he must be taken to have stood by with knowledge, and to have acquiesced or given subsequent approbation. That is the argument that has been presented to me. And it is said that this must have been so because these clerks were agents of the banking firm, and therefore notice to them was notice to the banking firm, and notice to the banking firm was notice to every partner.

Now, it must be remarked, the whole of that train of reasoning is as unfounded, as it appears to me, in fact as it is in law. First of all, as to the fact. It was not proved that *Hill* knew; it was not proved that *Richardson* knew. *Hill* was not called, but what was suggested was this, that they being persons of experience in banking, and being in the bank with the ordinary knowledge possessed by persons in their position, must have ascertained that some of these entries were fictitious and fraudulent. In the first place, it is not the habit of the Court to impute knowledge in this way. It would, in fact, not fall short of criminal conspiracy, which I am asked to impute to them, to join Sir *R. Harvey* in defrauding Mr. *Kerrison*. The Court is in the habit of requiring proof in such a case as that. I do not know the state of these men's minds. I cannot impute to them that, from merely occupying particular

positions, they were in all respects fit to occupy them. They may have been selected by Sir *R. Harvey* because they were stupid or unobservant men, or men who would not be likely to detect his frauds—men whom he could easily deceive. I am not at all at liberty to assume, for the purpose of fastening a criminal charge against these men, that they had all the knowledge that I am desired to impute to them; still less, when one has not been called, and the other has not been asked, am I at liberty to impute this knowledge to them. Men are often ignorant of what they do not wish to see, and I think it very probable they knew something was wrong, or suspected something was wrong, but I think it equally probable, as was the case apparently with the bill clerks, that although they suspected something was wrong, they knew their bread depended on their not investigating, and they were only too anxious not to inquire or find out more. Therefore I have no reason whatever to impute to them knowledge, and you must shew knowledge in the agent before you can impute constructive notice to the principal. So much for the fact.

But, assume they did know, what does it amount to? It amounts to this: with that knowledge they were confederates with Sir *R. Harvey* in cheating Mr. *Kerrison*. Will that be notice to *Kerrison?* It is against the very first principles on which the doctrine of constructive notice is founded. They are the very last persons in the world who would inform *Kerrison*. The theory of constructive notice is that the person who has the knowledge will inform the other for whom he is agent; but where, from the nature of the case, it is obvious they will do no such thing, then there is no constructive notice at all. But more than that, the doctrine of constructive notice, as applied to a partnership firm, no doubt makes the clerk or agent of the firm a person whose knowledge will affect the firm as a firm with constructive notice, and in that sense will make every partner liable for the consequences of the constructive notice as a member of the firm, but no one has ever carried that doctrine to this extent, that the knowledge of the agent of the firm shall be the knowledge of the individual partner as between himself and his co-partner; in fact, all the cases in Equity with which I am familiar have proceeded on the opposite

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doctrine. I may mention such cases as *Rawlins* v. *Wickam* (1), and many others. No one suggested for a moment that, as between the partners, a clerk is to be considered the agent, and the reason for it is obvious. The clerk is agent for both as regards third persons; he gives the knowledge or notice to both; but as between the two, why should he be supposed to communicate to one the rogueries of the other? I see no reason whatever, and in my opinion that argument fails.

Then the next reason was this: even supposing *Kerrison* did not know, as he did not know in fact, and had no constructive notice which would have been sufficient in law, as I think it would not have been, still he was guilty of laches or gross negligence, and his creditors or depositors in the bank are barred by that negligence from any right of proof. First of all, what is the meaning of the accusation of gross negligence by a pickpocket against the man whose pocket he has picked, who says: "If you had buttoned up your pocket I should not have been able to pick it so easily?" The case is really that, and only requires to be stated to shew how absurd the proposition is. If *Kerrison* had been solvent, and had filed a bill against Sir *R. Harvey*, who had also been solvent or able to pay something, and had asked for a judgment that Sir *R. Harvey* should restore to the bank the sums he has misappropriated, could a defence on the part of Sir *R. Harvey* have been admitted to this effect: "True, I have stolen your money, but I have stolen it six or seven years consecutively to a very large amount, and if you had been a careful man you would have found it out long ago, and therefore I am entitled to keep your money, and dismiss your action with costs"?

Now, applying the argument, which must be done fairly, to both sides, if the creditors, that is, the depositors of the bank, are to be bound by the laches of Mr. *Kerrison*, the stockbrokers, the creditors of Sir *R. Harvey*, must also be bound by his conduct, and, therefore, if, as between *Kerrison* and Sir *R. Harvey*, no such defence will be admitted, it is plain that no such defence ought to be admitted as between the joint estate and the separate estate.

(1) 3 De G. & J. 304.

There was one more argument on that part of the case which I can hardly treat more seriously, although I cannot pass it by. It was said that this was like the case of reputed ownership in bankruptcy, that the stockbrokers had been induced to give credit to Sir *R. Harvey* by the neglect of Mr. *Kerrison*, that if he had intervened sooner and broken up the bank and driven Sir *R. Harvey* into bankruptcy the stockbrokers would not have given credit to him, and they would not have lost so much. I do not know that at all. I have no means of ascertaining what the position was between Sir *R. Harvey* and the stockbrokers, or to what extent they trusted him, or on what ground they trusted him, or what they knew about his proceedings. I should have thought if they did know (it does not appear that they did, because he transacted business through several stockbrokers) the extent of the speculative transactions of Sir *R. Harvey*, they would not have trusted him at all. But I am not at liberty to indulge in any such speculations. I cannot find that there was any representation by *Kerrison* to the stockbrokers, or that they acted upon any representation by him, direct or indirect, that Sir *R. Harvey* was solvent. All they appear to have known was that Sir *R. Harvey* was carrying on an old-established business at *Norwich*, and was reputed to be a man of property and position in the county. I cannot see for a moment any analogy at all between the doctrine of reputed ownership in bankruptcy and the question of taking the account between the joint and separate estates. It appears to me that the argument has no bearing at all. [His Lordship then considered the arguments in favour of further delay and the production of further accounts, for which he was of opinion no sufficient ground had been shewn.]

Therefore I have come to the conclusion that I ought to allow the claim as asked; and as regards costs, I am afraid I am bound by the general order which adds the costs to the sum claimed; but I have made an exception in more than one instance as regards the costs of adjournment into Court. I intend to do so in the present instance. Instead of following the decision of my predecessor and others, I shall allow the costs of the adjournment into Court out of the estate, adding the rest of the costs in the usual way. The costs of the Plaintiff, of course, will be costs out of the

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estate, and I shall give no costs to the stockbrokers' representative. That is according to the terms of the order. Besides that, he is liable to additional costs occasioned by his intervening, and no doubt very considerable additional costs have been occasioned; but, considering that I am deciding against them, and therefore they will in effect lose all further claim on the estate, I think it would be a harsh order to make them pay any further costs. Therefore I make no order whatever as to their costs.

By the order of the Master of the Rolls as drawn up the claims were admitted at £600,000.

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The representative of the separate creditors appealed from this decision, and the appeal came on for hearing on the 4th of August, 1876.

Argument.

Benjamin, Q.C., *Davey*, Q.C., *B. B. Rogers*, and *Dundas Gardiner*, for the Appellant:—

We contend, first, that this claim ought not to have been admitted at all; and, secondly, that, if admitted, it ought to be reduced. As regards the first point, Sir *R. Harvey*, it cannot be denied, made false entries, committed forgeries, and grossly defrauded his partners. Now, no doubt, if a trader increases his separate estate by a fraud on his partners, there is a right of proof against his separate estate; but we contend that the rule goes no further; the fraud which gives a right of proof is a fraud in the nature of a fraudulent preference. Where a partner steals money from the firm and gambles it away, his separate estate is not increased at the expense of the partnership estate, and we contend that in such a case there is no right of proof: *Fordyce's Case* (1); *Ex parte Lodge* (2); *Ex parte Broome* (3); *Ex parte Grill* (4). The Master of the Rolls relied on *Ex parte Harris* (5); but in that case the proof was rejected, and everything cited against us is a mere *dictum*. The same remark applies to *Ex parte Smith* (6).

(1) Cooke's Bankruptcy Law, 8th Ed. p. 531.
(2) 1 Ves. 166.
(3) 1 Rose, 69.
(4) Cooke's Bankruptcy Law, 8th Ed. p. 530.
(5) 2 V. & B. 210.
(6) 1 Gly. & J. 74; 6 Madd. 2.

Ex parte Watkins (1) was a clear case of increasing the private estate at the expense of the joint. In *Ex parte Turner* (2) and *Ex parte Hinds* (3) the proof was rejected under circumstances very similar to the present. Moreover, in the present case Sir *R. Harvey* was allowed to have the sole and uncontrolled management of the business, and no partner who acquiesced in this, can, as against third parties, be heard to complain of anything that *Harvey* did. We contend, therefore, that the proof ought not to be admitted at all.

JAMES, L.J.:—

We are unanimously of opinion that we are bound by the law as laid down in *Ex parte Harris* (4). What have been called *dicta* appear to us to be deliberate and conclusive statements of the law, which have never since been departed from. The rule there laid down by Lord *Eldon*, who understood bankruptcy law better than any man then living, is, that if a partner fraudulently takes money out of the partnership assets for his own private purposes, a proof can be made for it against his separate estate. As regards the argument that the separate estate has not been enlarged, it is enlarged if the joint estate is employed in paying sums which the separate estate ought to have paid. If the sums which became due to the stockbrokers had not been paid out of the joint estate, they could have been proved against the separate estate, so no wrong is done to the creditors. If you can shew that any of the overdrawings were simple overdrawings, not tainted by fraud, the case will be different as to them.

Appellant's argument continued:— Argument.

As to reducing the amount, we say that the principle of *Clayton's Case* (5) ought to have been applied. Sir *R. Harvey's* drawings were not all tainted with fraud, and he paid in from time to time considerable sums. If, then, the account be taken according to *Clayton's Case*, the amount fraudulently drawn will be found to have been to a considerable extent repaid.

(1) Mont. & Mac. 57.
(2) Mont. & A. 52; 4 D. & Ch. 169.
(3) 3 De G. & Sm. 613.
(4) 2 V. & B. 210.
(5) 1 Mer. 585.

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JAMES, L.J.:—

I am of opinion that *Clayton's Case* (1) cannot be applied to fraudulent items. If, indeed, a partner fraudulently draws out £10,000, and then pays in a sum of £10,000, specifically appropriating it with his partner's knowledge to meet the sum drawn out, there is an end of it; but if he goes on manipulating the accounts, and concealing the fraud from his partner, the fraud must be made good when it is discovered. Sums of money which he paid in and entered in the books must be attributed in the first place to moneys drawn out, which were also entered in the books.

Mellish, L.J.

MELLISH, L.J.:—

Suppose a partner fraudulently draws out £20,000, and then draws out openly £10,000 more, which he enters in the books, so that it is a simple overdrawing without fraud. He then pays in £30,000. It is contended that he has repaid the £20,000, and that unless he makes further fraudulent overdrawings there is no right of proof against his separate estate. But suppose he openly draws £30,000 out again, the firm is cheated of the £20,000 just as much as if he had never paid in the £30,000. I am of opinion, therefore, that *Clayton's Case* cannot be applied to fraudulent debts of this nature.

BAGGALLAY, J.A., concurred.

The case then stood over, owing to the arrival of the Long Vacation.

On the 8th of November the case was in the paper, but the counsel for the Appellants stated that, after the decision on the above questions of law, it was useless for them to argue the case further.

The appeal was therefore dismissed without further argument.

Solicitors: *Sole, Turners, & Knight*; *Linklaters & Co.*; *Travers Smith & Co.*; *Lyne & Holman.*

(1) 1 Mer. 585.

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C. A. 1876 *Nov.* 30; *Dec.* 21.

Bankruptcy—Stock Exchange Rules—Fraudulent Preference.

An assignment of part of the property of a man who is unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure.

According to the rules of the *Stock Exchange* a member who is unable to meet his engagements on the *Stock Exchange* is declared a defaulter, ceases to be a member, and cannot be re-admitted unless he pays 6*s.* 8*d.* in the pound on his *Stock Exchange* debts. According to the same rules his *Stock Exchange* assets are collected by the official assignees of the *Stock Exchange*, and distributed among the *Stock Exchange* creditors. A member who had been declared a defaulter attended the usual meeting of the *Stock Exchange* creditors and gave to the official assignees, for distribution among his *Stock Exchange* creditors, a cheque on his bankers for £5000, being about five-eighths of his assets, stating at the same time that he had none but *Stock Exchange* creditors. On the day after this sum had been distributed the debtor informed the *Stock Exchange* creditors that his father-in-law claimed to be a creditor for a large amount for money lent. It did not appear that up to this time the debtor had committed any act of bankruptcy, but soon afterwards he filed a liquidation petition, and was adjudged bankrupt:—

Held (reversing the decision of the Registrar), that the trustee in bankruptcy was entitled to recover the £5000 from the official assignees of the *Stock Exchange*.

Affirmed by H. of L. 3 App. Cas. 213.

Statement.

THIS was an appeal by the trustee in bankruptcy of *J. E. Cooke* from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge.

Cooke was a broker on the *Stock Exchange* from 1872 till the 27th of April, 1876, and was admitted a member according to the rules of the *Stock Exchange* (1). On the 26th of April, finding

(1) The following are the most material of the rules for the present purpose:—

"16. The committee may expel or suspend any member of the *Stock Exchange* who may be guilty of dishonourable or disgraceful conduct, or who may violate any of its regulations, or fail to comply with any of the committee's decisions. The resolution for expulsion or suspension must be carried by a majority of three-fourths in a committee specially summoned for the purpose, and consisting of not less than twelve members, and must be confirmed by a majority of the committee at a subsequent meeting specially summoned."

"142. A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee.

"143. A member declared a defaulter in the *Stock Exchange*, or a member who may become bankrupt or insolvent, although he may not be at

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that he could not tide over the settling day, he applied for assistance to his father-in-law, who had helped him on two former occasions, and to whom he was heavily indebted, but on the 27th he was informed that his father-in-law would not help him again. *Cooke* then, on the same morning, gave formal notice to the secretary of the *Stock Exchange* that he could not fulfil his engagements, and his failure was announced in the room in the usual way. The official assignees of the *Stock Exchange* thereupon sent a notice to the *Bank of England*, with whom *Cooke* kept his

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the same time a defaulter in the *Stock Exchange*, ceases to be a member.

"144. When a member shall give private information to his creditors of his inability to fulfil his engagements, the creditors shall not make any compromise with such defaulter, but shall immediately communicate with the chairman, deputy chairman, or two members of the committee, in order that the member in default may be immediately declared; and in case the committee shall obtain knowledge of any private failure, the name of the defaulter shall be publicly declared."

"148. Creditors for differences shall have a prior claim on all differences received by, or due to, a defaulter's estate."

"153. The committee will not admit or recognise any payment or claim on a defaulter's account that does not arise from a *Stock Exchange* transaction."

"156. A defaulter shall not be eligible for re-admission who shall not have paid from his own resources, independently of his security-money, at least one-third of the balance of any loss that may occur on his transactions, whether on his own account or that of principals; or who, in the event of his debts being less than the amount which his sureties may be called upon to pay, shall not have refunded to the sureties one-third of the amount paid by them."

"160. Non-members shall be allowed an equal participation of assets, subject to the same conditions as members, provided their claims be admitted by the creditors, or in case of dispute by the committee; and a person whose claim is so admitted may be represented at the meeting of creditors by any member whom he may select."

"166. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings, to enter into a strict examination of every account, to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the direction of the majority of the creditors present.

"167. In every case of failure the creditors shall appoint two of their body, to whom the official assignees shall refer in all matters relating to the failure. The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall divide the same as soon as possible."

A general discretionary power of dispensing with the rules was given to the committee.

account, and with whom he had a balance of about £5000. On the following day a meeting of the *Stock Exchange* creditors was held, at which *Cooke* was present and made a statement as to his affairs. The creditors, as he stated by his affidavit, decided that if he could get enough to make up 13*s.* 4*d.* in the pound, including the assets he then shewed, which were about £8000, the *Stock Exchange* would be content. The official assignees then requested him to give them a cheque for £5000 to be distributed among his *Stock Exchange* creditors, which he accordingly did. The official assignees received the proceeds of the cheque, and got in £360 due from members of the *Stock Exchange* for differences. Out of the £5360 thus received they distributed among the *Stock Exchange* creditors, on the 2nd of May, £4260, making a dividend of 3*s.* 4*d.* in the pound on their debts, which amounted to £24,790. One of the official assignees and two other persons who were present at the meeting deposed that *Cooke* stated at it that he did not owe any debt to others than members of the *Stock Exchange*, and that, on being questioned as to advances from his father-in-law, he stated that all the moneys he had received from his father-in-law were gifts. It was further deposed that it was not till an adjourned meeting, on the 3rd of May, that *Cooke* informed his *Stock Exchange* creditors that he was indebted to his father-in-law. The claim of the father-in-law, it appeared, was for £107,850. *Cooke* deposed that his total assets were at the time of his stopping payment about £8000, including the £5000 at his bankers.

On the 13th of May *Cooke* filed a petition for liquidation, which became abortive, and on the 1st of June his father-in-law filed against him a petition for adjudication, under which he was adjudged bankrupt, the act of bankruptcy being the filing of the liquidation petition.

The trustee, on the 31st of July, moved that the official assignees might be ordered to pay to him the £5000 received by them from the bankrupt. Mr. Registrar *Pepys*, on the hearing of the motion, held that the £5000 was received before any act of bankruptcy, for that *Cooke's* not attending the *Stock Exchange* was not such an absenting himself from his place of business as to constitute one—and no other act of bankruptcy till the 13th of May was suggested; that the payment was not a fraudulent pre-

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ference, as there was pressure, and that of the strongest kind; nor was it a fraudulent conveyance of part of the bankrupt's property under sect. 6, sub-sect. 2, of the *Bankruptcy Act*, 1869. His Honour accordingly refused the motion with costs.

The trustee appealed.

Argument.

Lanyon, for the Appellant:—

I say, first, that this was a fraudulent transfer of part of the debtor's property under sect. 6, sub-sect. 2, of the *Bankruptcy Act*: *In re Wood* (1); *Smith* v. *Cannan* (2). Then we say that it was in the nature of a fraudulent preference: *Devon* v. *Watts* (3). The authority of the old cases on fraudulent preference is recognised in *Ex parte Pearson* (4). The rules are laid down in that case and in *Ex parte Tempest* (5), *Ex parte Bolland* (6), and *Ex parte Topham* (7); and this case comes within them. It is very like *Ex parte Halliday* (8), where the handing over a balance to a particular creditor was held bad as a fraudulent preference, and Lord Justice *Mellish* also considered it an act of bankruptcy, and it is treated as such in *V. Williams'* Bankruptcy Practice (9). It has been held in several cases that if a creditor assigns a portion of his property to a favoured class it is bad: *Ex parte Cohen* (10); *Ex parte Wensley* (11). The transfer here was voluntary, for the *Stock Exchange* rules only authorize the official assignees to collect the moneys due on the *Stock Exchange*. The *Stock Exchange* rules cannot repeal the bankruptcy law: *Ex parte Cooke* (12). I say, further, that this transfer was bad under sect. 92 of the Act. A transaction under it is only protected if the money is received in good faith, *i.e.*, without notice that the person paying it is doing a wrong to his other creditors: *Butcher* v. *Stead* (13); *Ex parte Arnold* (14). Lastly, the payment was received with notice of an act of bankruptcy, for the debtor absented himself from the *Stock*

(1) Law Rep. 7 Ch. 302.
(2) 2 E. & B. 35.
(3) 1 Doug. 86.
(4) Law Rep. 8 Ch. 667.
(5) Ibid. 6 Ch. 70.
(6) Ibid. 7 Ch. 24.
(7) Ibid. 8 Ch. 614.
(8) Law Rep. 8 Ch. 283.
(9) 2nd Ed. p. 18.
(10) Law Rep. 7 Ch. 20.
(11) 1 D. J. & S. 273.
(12) *Ante*, p. 123.
(13) Law Rep. 7 H. L. 889.
(14) 3 Ch. D. 70.

Exchange, which was his usual place of business, and this is an act of bankruptcy: *Bernasconi* v. *Farebrother* (1); *Ex parte Meyer* (2).

De Gex, Q.C., and *Finlay Knight*, *contrà*:—

It is an act of bankruptcy if a trader stays away from his ordinary place of business for the purpose of delaying his creditors, his place of business being the place where his creditors would come to find him. Here it is not alleged that his staying away from the *Stock Exchange* was for the purpose of delaying, or could delay, his *Stock Exchange* creditors; and as regards outside creditors, the *Stock Exchange* is a place where they could not come to find him. There was therefore no act of bankruptcy until after the time when this payment was made. Then, as to the other part of the case, an assignment of substantially the whole of a man's property to pay antecedent debts is bad: a purely voluntary assignment of part of it by an insolvent to secure a pre-existing debt is bad; but an assignment of part under pressure is good: *Smith* v. *Timms* (3); *Ex parte Norton* (4); *Ex parte Topham* (5); *Edwards* v. *Glyn* (6); *Strachan* v. *Barton* (7); *Hartshorn* v. *Slodden* (8). The case of *Ex parte Pearson* (9) has little bearing upon this. In that case there was a fraudulent attempt to evade the bankruptcy laws. Here a debtor under pressure hands over part of his property to pay a particular class of creditors, leaving a substantial part of his property untouched. The payment here was made under the *Stock Exchange* rules, which form a contract entered into before bankruptcy was thought of, and we contend that they are binding: *Merry* v. *Nickalls* (10).

Lanyon, in reply, referred to *Ex parte Reader* (11); *Bills* v. *Smith* (12); *Belcher* v. *Jones* (13).

(1) 10 B. & C. 549.
(2) Law Rep. 7 Ch. 188.
(3) 1 H. & C. 849; 9 Jur. (N.S.) 1285.
(4) Law Rep. 16 Eq. 397, 405.
(5) Ibid. 8 Ch. 614.
(6) 2 E. & E. 29.
(7) 11 Ex. 647.
(8) 2 B. & P. 582.
(9) Law Rep. 8 Ch. 667.
(10) Ibid. 7 H. L. 530.
(11) Ibid. 20 Eq. 763.
(12) 6 B. & S. 314.
(13) 2 M. & W. 258.

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Judgment.

1876. Dec. 21. JAMES, L.J., delivered the judgment of the Court (*James*, L.J., *Baggallay*, J.A., and *Brett*, J.A.):—

In this case the bankrupt was a member of the *Stock Exchange*. Finding himself one day unable to meet his engagements, he submitted himself to the domestic jurisdiction which is established by that body in like cases. He attended an official meeting of his creditors. There he was interrogated as to his assets and liabilities, and he stated among other things that he had at his bankers a sum of £5000. He was thereupon requested—or perhaps it might be stated that he was "requisitioned"—to hand over the £5000 to the official assignee of the *Stock Exchange* for distribution among the *Stock Exchange* creditors, and he complied with that requisition. It should perhaps be stated that an inquiry was made of him as to his outstanding debts, and he stated in substance there were none of any importance. One happened to be known about by these people on the *Stock Exchange*, or some of them, viz., that an advance had been made by a relative, and that the bankrupt alleged that was by way of gift, and not by way of loan. That is not correct. In all probability he himself hoped and anticipated that that view might be taken of the transaction by his relative. The relative, however, was not minded to take that retrospective view of the transaction. Proceedings in bankruptcy ensued. The trustee in bankruptcy was appointed, and the trustee in bankruptcy applied to the official assignee of the *Stock Exchange*, and requested him to hand back that £5000. Whether he was entitled to make that demand was the question before the Registrar, and is the question before us.

We are of opinion that that demand was lawfully and rightfully made by the trustee in bankruptcy, and upon this broad, general and universal principle, that any *cessio bonorum* made by an insolvent on the eve of bankruptcy for the benefit of some creditors to the exclusion of others, or any scheme or arrangement made for the distribution of the assets by such person otherwise than according to the provisions of the bankruptcy law, is a plain and palpable fraud on the bankruptcy laws, a plain and palpable fraud upon the creditors who are excluded or disappointed, or who may be delayed or hindered thereby.

The old cases of assignment for the benefit of creditors, cases of fraudulent preference, are merely illustrations of that general principle which underlies the whole of the administration of the estates of insolvents in this country.

It was suggested that this was done merely in obedience to the rules and regulations of the *Stock Exchange*. My answer to that is that the *Stock Exchange* is not an *Alsatia*. The Queen's laws are paramount there, and the Queen's writ runs even into the sacred precincts of *Capel Court*.

It was contended, also, that this case might be brought within those cases in which an importunate creditor has been allowed to retain the fruits of his importunity. Now, a creditor may lawfully and successfully importune his debtor for payment, but no creditor or creditors can by any amount of importunity or coercion on the one hand, or largess on the other, lawfully and successfully obtain an assignment of any part of an insolvent debtor's property to a trustee for distribution among a special class of creditors—trade creditors, private creditors, English creditors, *Stock Exchange* creditors—in direct and express contravention of the bankruptcy laws. It was suggested that in this particular transaction the man was not minded to make a preference to anybody, but he was only induced to do it and was only doing it for his own emolument and benefit, with a view to being reinstated again on the *Stock Exchange*. Putting the thing in plain language, it was this: An insolvent on the eve of bankruptcy takes some of his creditors' money to provide himself a comfortable resting-place after his bankruptcy, and a special body of creditors say to him this: "Cheat your other creditors for our benefit, and we will re-admit you as a proper and worthy member of our fraternity."

If anything were wanting, this supplies it. It shews how improper and utterly illegal the whole of the transaction was. The order of the Registrar must be discharged, and an order must be made in accordance with the motion made by the trustee under the bankruptcy for the payment of the money by the official assignee of the *Stock Exchange*, who must pay all the costs, both below and here.

Solicitors: *Lewis & Lewis; Lawrance, Plews, & Co.*

C. A. 1876 Dec. 16, 18.

In re BRENTWOOD BRICK AND COAL COMPANY.

Vendor and Purchaser—Vendor's Lien.

It was agreed between *A.* and a trustee for an intended company that as soon as the company was formed and had adopted the agreement, *A.* should sell and the company purchase *A.'s* interest in a leasehold brickfield, and that on an assignment to the company being executed the company should pay him as the purchase-money £8000 in manner thereinafter mentioned, namely, £6000 in cash and £2000 in fully paid-up shares. The property was assigned to the company by a deed which stated the consideration to be £6000, to be paid to *A.* as thereinafter mentioned, viz., 50 per cent. on all sums of money to be received from sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital until the £6000 was paid. The company became abortive; no money was ever received by sale of shares, or borrowed, and ultimately the company was ordered to be wound up:—

Held (affirming the decision of *Malins*, V.C.), that the nature of the contract was such as to exclude vendor's lien, and that *A.* had no lien on the leasehold premises.

Statement.

THIS was an appeal from an order of Vice-Chancellor *Malins* directing the proceeds of the sale of a leasehold brickfield, on which the Appellant claimed a vendor's lien, to be disposed of as part of the assets of the *Brentwood Brick and Coal Company, Limited.*

By an agreement dated the 16th of October, 1874, made between the Appellant of the one part, and *J. R. Banner*, as trustee for a company intended to be formed, and called *The Brentwood Brick and Coal Company, Limited*, of the other part, it was agreed that so soon as the company should have been formed and registered under the Companies Acts, and the directors should have adopted the agreement and proceeded to an allotment of shares, the Appellant should sell and the company purchase the goodwill, plant, machinery, and implements of the Appellant in his manufactory of bricks and business of a coal merchant at *Brentwood.* That the company, upon an assignment and transfer of such goodwill, plant, machinery, and business, and other effects, being made, should, in consideration thereof, pay out of the funds of the company to the Appellant, his executors, administrators, or

assigns, as and for the purchase-money of the same, the sum of £8000 in manner thereinafter mentioned, namely, the sum of £6000 in cash, and the further sum of £2000 by delivery to the Appellant, his executors, administrators, or assigns, or his or their nominee or nominees, of 400 shares in the company upon which £5 per share should be taken as having been paid. And the Appellant, for the consideration aforesaid, agreed to execute an assignment to the company of the lease of his business premises.

The company was registered on the 2nd of November, 1874, under a memorandum and articles, with a capital of £25,000 in 12,500 shares of £2 each. The articles referred to the agreement and provided that "The directors may pay out of the funds and capital of the company to the vendor the sum of £8000, the agreed purchase-money for the property as before-mentioned, and they may pay the said sum in such manner and form as they and the vendor may agree upon."

The agreement was adopted by the company, and the assignment from the Appellant to the company was effected by an indenture dated the 26th of February, 1875, by which, after reciting that the Appellant had agreed with the company for the sale to them of the land and premises in the lease for £6000, to be paid to the Appellant as thereinafter mentioned, that was to say, 50 per cent. of all sum or sums of money received or to be received by the company on the sale of shares, and the like sum of 50 per cent. upon all money by way of capital to be at any time borrowed by the company until the payments so to be made to the Appellant should amount to the said purchase-money or sum of £6000, the Appellant, "in consideration of the said sum of £6000 to be paid to him in manner thereinbefore stated," assigned the premises to the company. 1000 fully paid-up shares were in the same month allotted to the Appellant or his nominees.

Upon the execution of this deed, the company were let into possession. The company proved completely abortive. No shares were taken except the above 1000 shares, and the shares necessary to qualify the directors; and the company, after the date of the assignment, never received any money upon the sale of shares, nor received any money by way of capital, nor borrowed any money.

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In re BRENTWOOD BRICK AND COAL CO.

On the 15th of July, 1875, the company passed a resolution for a voluntary winding-up, which, by order dated the 27th of July, 1875, was continued subject to supervision.

The business premises were sold with the sanction of the Court, and the proceeds paid into Court. The Appellant claimed a lien for his unpaid purchase-money, but Vice-Chancellor *Malins* decided against his claim, and made the order now appealed from.

Argument.

Higgins, Q.C., and *Chester*, for the Appellant:—

The cases as to what is sufficient to destroy a vendor's lien are collected in *Dart's* Vendors and Purchasers (1). We have performed our part of the contract, and assigned to the company: are we not to be paid at all? Suppose a person buys a brickfield for £6000, to be paid by a percentage on all the bricks made, and then never makes a brick, surely the vendor must have some remedy. *Gore and Durant's Case* (2) is very similar to the present case.

[BAGGALLAY, J.A.:—There is no contract stated here to sell for £6000, the consideration is "the sum of £6000 to be paid as hereinafter mentioned."]

Whatever the form of the contract may be, the Court will not hold that the company is entitled to keep the land without paying anything for it.

[BAGGALLAY, J.A., referred to *Dart's* Vendors and Purchasers (3), as to a bond being given payable on contingencies which could not be calculated.

JAMES, L.J.:—For what do you claim a lien? £6000 to be paid in this way is a very different thing from £6000 to be paid down.]

The original contract before the company was formed was £6000, without any consideration as to the mode of payment. The cases of *Hughes* v. *Kearney* (4), *Winter* v. *Lord Anson* (5), and *Matthew* v. *Bowler* (6), are against the lien being lost.

(1) Page 729.
(2) Law Rep. 2 Eq. 349.
(3) Page 736.
(4) 1 Sch. & Lef. 132.
(5) 3 Russ. 492.
(6) 6 Hare, 110.

[*Glasse*, Q.C., referred to *Earl Jersey* v. *Briton Ferry Company* (1).]

Glasse, Q.C., and *Boome, contrà*, were not called upon.

JAMES, L.J.:—

Judgment, James, L.J.

I am of opinion that the order of the Vice-Chancellor must be affirmed. The case of the Appellant may be a hard one, but the nature of the transaction excludes vendor's lien. This is not the case of a simple agreement to sell for £6000. No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, "Half of the first capital moneys that come in to the extent of £6000 is to be my purchase-money." No day for payment was named: he agreed to receive his purchase-money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property. I am, therefore, of opinion that the Vice-Chancellor came to a correct conclusion.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. In *Winter* v. *Lord Anson* (2) the Lord Chancellor says: "As in this case there was no agreement for the extinguishment of the lien, and as, in my judgment, there is nothing in the transaction itself, as evidenced by the instruments, leading to a clear and manifest inference that such was the intention of the parties, I think it should be declared that the Plaintiffs have a lien upon the estate in question for the residue of the purchase-money." Here, I think, it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company. *Gore and Durant's Case* (3) was

(1) Law Rep. 7 Eq. 409. (2) 3 Russ. 492.
(3) Law Rep. 2 Eq. 349.

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relied upon by the Appellant, but without saying whether I should be disposed to affirm that case on all points, I am of opinion that it is quite distinguishable from, and does not govern, the present. In that case the agreement was that the purchase-money should be paid partly in shares and partly in cash, as and when the company should receive any money in respect of shares subscribed for over and above the first £1000, and that if the shares and cash should not be paid within two years from the date of the agreement, the agreement should be void, and any shares and cash paid thereunder should be retained by the vendor as liquidated damages. Not only was the cash not paid within the two years, but the failure of the company made it impossible that it ever should be paid, and the Master of the Rolls had to do justice in the best way he could. Here there is no engagement to pay within a limited time.

Brett, J.A.

BRETT, J.A.:—

I am of the same opinion, and for the same reasons as the Lord Justice *James*, and it would be useless for me to express those reasons in other terms.

Solicitors: *W. Neal; G. Blagden.*

C. A. 1876 V.-C. M. *Dec.* 3. C. A. 1877 *Feb.* 3.

In re IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* LARKING.

Company—Liability of Directors—Their Duty as Trustees—Fraud—Constructive Notice.

The promoters of a company, who were also directors, purchased land and sold it to the company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, *L.*, a director, but not one of the promoters, purchased 100 of the debentures at 25 per cent., for which he claimed to prove:—

Held, by *Malins*, V.C., that *L.*, as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that, having been in the position of a trustee for the shareholders, he could not, by the purchase

of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented, and that the claim must be disallowed.

On the claim being heard by the Court of Appeal the matter was compromised on the terms of the official liquidator paying to *L.* the amount which he actually paid for the debentures, with interest from the date of purchase.

THIS was an adjourned summons in the winding-up of the *Imperial Land Company of Marseilles* on a claim made by Mr. *Larking* to be admitted as a creditor for £2000, in respect of 100 debenture bonds for £20 each, with interest thereon. Mr. *Larking* was appointed a director at the first board meeting of the company, on the 24th of February, 1866. At that meeting a contract dated the same day was sanctioned for the purchase from Mr. *Masterman* by the company of certain land at *Marseilles* for the sum of £3,325,000. Mr. *Larking* was not present at that meeting, but he was present at the following meeting held on the 8th of March, at which the minutes of the previous board meeting were read and confirmed. The debenture bonds held by Mr. *Larking* were part of £452,000 issued by the company on the 28th of March, 1866, to Mr. *Masterman* in pursuance of the contract and in part payment of the land so purchased from him. Mr. *Larking* was present at the board meeting of the 28th of March, and part of the debentures were signed by him as a director of the company. On the 5th of September, 1867, a resolution, proposed by the chairman and seconded by Mr. *Larking*, was passed for winding up the company, and on the 16th of December, 1867, Mr. *Larking* resigned his appointment as a director.

On the 24th and 25th of March, 1868, Mr. *Larking* purchased, through the secretary of the company, 100 of the debenture bonds which were held by one of the directors for the sum of £587 10*s.*, which was alleged to be their full market value.

A suit was afterwards instituted intituled the *Imperial Land Company* of *Marseilles* v. *Masterman and Others*, to obtain a declaration that the contract with *Masterman* was a fraud upon the company, and void, and praying that *Masterman* might be ordered to deliver up for cancellation such of the debentures issued under the contract as were in his possession, and to indemnify the company

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against such as he had parted with. It appeared in the suit that out of the purchase-money of £3,325,000, which under the contract was to be paid to *Masterman*, only £2,665,000 was to be paid to the real owners of the property, and the remaining sum of £660,000 was to be received in various proportions by the promoters of the company. Before the suit was brought to a hearing a compromise was entered into under which a large sum of money was paid back by several of the Defendants to the liquidators.

In January, 1874, Mr. *Larking's* summons first came on for hearing, when his proof in respect of the 100 debentures was admitted subject to the equities, if any, which affected them in his hands, the validity of the original issue of which was impeached in the suit. The compromise, however, having been so effected, the summons came on to be heard in order to be finally disposed of.

Mr. *Larking*, in the course of his examination and cross-examination, stated that he was not a director of the company at the time the contract was entered into, and was not aware of the fact that the whole of the purchase-money was not to be paid to the real owners of the property. He was not consulted by Mr. *Vallance* (the solicitor of the company) about the price to be paid for the land, and was ignorant of the purchase until he became a director. He had asked for the contract but could not get it. He had been to *Marseilles* to inspect the property, and had been told while there that the company was paying a high price for the lands. He never heard from the directors or other persons that a part of the purchase-money was paid to persons other than the vendors, but he had heard so since. While he was a director he heard a vague report that money had been paid to the promoters, but he had no proof of it, and could not say from whom he had heard it. That was about twelve months after the formation of the company. He did not investigate the matter, but said he would watch *Albert Grant*, to see whether there was any truth in the story, and if he did, he would leave the company. He also stated that he had resigned the directorship on the 16th of December, 1867, and had purchased the debentures on the 24th and 25th of March, 1868, but he did not know at the time he purchased the debentures that the company was in liquidation. If he had known it, he would not have purchased them.

The summons came on for hearing before Vice-Chancellor *Malins* on the 2nd of December, 1876.

J. Pearson, Q.C., and *Romer*, in support of the summons:—

These debenture bonds were purchased by Mr. *Larking* in the market at the price of the day, and he has a clear right to be paid the full value of them. The Court has already decided, in *Ex parte Colborne and Strawbridge* (1), that these bonds were promissory notes or negotiable instruments, and amounted to contracts to pay any one who might happen to be the bearer. Under that decision other debenture holders have received the value of their bonds. Mr. *Larking* was not a director of the company when the contract for the purchase of the land at *Marseilles* was entered into, though he afterwards became a director. He states that he was not aware of the terms of the purchase, and that he was unable to obtain information respecting the contract, although he applied for it. He was, therefore, a purchaser for value without notice of any equities which existed between the vendors and the company. The suit of the *Imperial Land Company of Marseilles* v. *Masterman* was for the purpose of determining the validity of the original contract for buying the land, the purchase-money for which was partly paid with these debentures; but that suit was compromised, and the contract stands. The company, therefore, have got the land, but they virtually refuse to pay the purchase-money. The Court cannot on this summons investigate the whole proceedings with regard to the purchase of the land, to say whether the contract was tainted or affected with any equities. The debentures were purchased by Mr. *Larking* without any knowledge on his part of any improper transactions. The sale is confirmed, and cannot now be impeached, and certainly not in these proceedings, when the parties said to be implicated are not before the Court.

Glasse, Q.C., *Higgins*, Q.C., and *Wingfield*, for the liquidators:—

This is a case of a director knowingly being party to the issue of debentures which were fraudulently and improperly issued. That

(1) Law Rep. 11 Eq. 478.

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he must have known it is evident from the fact that he was a director from the first to the last, and had every means of knowing all the transactions of the company, and if he did not know them, he is affected with notice. Moreover, he signed some of the debentures himself when they were issued. He admits that he knew the property purchased from *Masterman* belonged to several persons at *Marseilles*, who were the real owners of it. He went himself to *Marseilles* to inspect the land. While there he was under the impression that the owners were selling direct to the company, therefore he admits he knew that *Masterman* was not the real owner of the property, and it was his duty to ascertain the true nature of the transaction. He says he heard that money had been paid to promoters. That was twelve months after the formation of the company. If he had inspected the contract, as it was his duty to do, he would have ascertained that the purchase-money was "salted," or increased beyond the sum paid to the vendors for the benefit of the promoters or some of them. His statement that he resigned his directorship is not true, since the resolution to wind up the company was passed while he was a director, and that resolution was actually seconded by Mr. *Larking* himself. These debentures were purchased by him on the 24th and 25th of March, 1868, which was after the company was in liquidation, and when he knew it was being wound up. It has been decided that a director does not escape the liability of his conduct after the winding-up, but is liable for what he has done in the management of the funds. It was said by Lord *Romilly* in *Land Credit Company of Ireland* v. *Lord Fermoy* (1): "Directors are, so far as regards the employment of the funds of the company, trustees for the shareholders, and are answerable to their *cestuis que trust* for the due employment of the funds entrusted to them." A director who retires still retains the liability of a director for certain purposes, as we find in the case of the *Madrid Bank* v. *Bayley* (2). And it was held in the *Joint Stock Discount Company* v. *Brown* (3) that directors, though not present at all the meetings, are liable for a breach of trust committed by their co-directors.

(1) Law Rep. 8 Eq. 7, 11. (2) Law Rep. 2 Q. B. 37.
(3) Law Rep. 8 Eq. 381.

In fact, therefore, Mr. *Larking* purchased what he knew to be worthless property on the chance of getting 75 per cent. upon the transaction. It was a mere speculation, and the purchase was not made in the open market, but through the secretary of the company. It is impossible that Mr. *Larking* should have gone to *Marseilles* and seen the land and talked about it on the spot, without knowing that the company had been cheated. He was in an exceptionally advantageous position to know all about it, and if he had made those inquiries which it was his duty to make, he must have discovered that there was no less than £665,000 paid without any consideration whatever, and the £452,000 debentures are included in that £665,000. The decision in *Ex parte Colborne and Strawbridge* (1) was to the effect that the holders for value of the debentures without notice were entitled to stand as creditors of the company; but Mr. *Larking* was not a holder of the debentures without notice, for he was a party to issuing these debentures. If he did not know for what they were issued he ought to have known it, and it was his duty to have inquired. There was not a shilling of value given for the debentures, for they were issued to pay the £665,000 over and above the actual purchase-money. The debentures are, therefore, worthless in his hands, and he cannot sustain this claim. The debentures are, in his hands, mere *choses in action*, notwithstanding the form being "payable to bearer;" he is not a holder for value without notice, nor is he a holder for full value; he bought them under circumstances which were quite enough to put him on inquiry. He knew the circumstances under which the debentures were issued, and ought to have prevented their issue. He bought the bonds after the company was in liquidation, and in this the case resembles the law of bankruptcy, where it has been held that a man cannot buy a debt of a bankrupt after the bankruptcy except under very special circumstances. The case of *In re Bowles* (2) is an authority upon that point. The onus is upon the bankrupt to shew that the notes were in the hands of *bonâ fide* holders at the time of the bankruptcy. Under these circumstances, therefore, the claim ought to be disallowed with costs.

(1) Law Rep. 11 Eq. 478. (2) Buck, Rep. 490.

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Argument.

Romer, in reply:—

The mistake made by the Defendants is in saying that these debentures were given in payment of the £665,000, when in fact they were issued as part payment of the whole purchase-money for the land. They have no right to say that these debentures represented that portion of the purchase-money which was not paid to the vendors. Consequently a great portion of these bonds represent the money really paid for the purchase. They cannot impeach these bonds without impeaching the whole transaction; they cannot cancel the bonds as to part only. The other parties to the transaction are not here, and they have agreed not to undo the transaction as a whole. But they keep to the purchase, and try to get back part of the purchase-money from these debenture holders. The course open to the Defendants is to impeach the whole purchase, and ask to return the property bought and to have the debentures delivered up. They have already got back the amount of salting over and above the actual purchase-money, and the Court cannot take an account now to ascertain what part of the purchase-money was paid by the debentures. The compromise of the suit was on the footing that the outstanding debentures would rank against the company. It is said there was a fraud, but if *Larking* was not a director at the time it was carried out he cannot be held responsible for it. Where there is a concealed fraud, and a director shews that he, personally, had no actual notice of it, he cannot be held liable, nor can he be affected with full notice of the fraud, because he might, if he had taken certain proceedings, possibly have discovered the existence of it. *Larking* did not attend the meeting at which the contract was resolved upon, though he attended the subsequent meeting when the minutes of the previous meeting were read and confirmed, but that does not make him liable for what was done when he was not present. The mere fact that part of the purchase-money was to be paid to *Masterman* was not sufficient to make him suspect the nature of the transaction. If he had been a stranger to the company he would have had a right to purchase these debentures, and the fact of being a director does not take away that right. No one ever heard of a director not being permitted to purchase shares in the company. *Larking* is,

therefore, entitled to prove for the whole amount of his claim in respect of these debentures.

MALINS, V.C.:—

Mr. *Larking*, in this case, claims to prove against the company for 100 promissory notes or debentures of £20 each. Those debentures he bought on the 24th and 25th of March, 1868, and he states in his examination that he gave for them £587; that is, he bought them at nearly, not quite, 75 per cent. discount. The question is whether he can be permitted to stand as a creditor against the company for anything whatever upon those debentures, and, if he can so stand as a creditor at all, whether he can stand as such for more than he actually paid for them.

In order to prove that he is not entitled to stand as a creditor at all, it is stated, and admitted, that this company having been formed in February, 1866, he was appointed a director at the very first meeting which was held, namely, the 24th of February in that year. He was appointed, and is named in the resolution as one of the first directors. He did not, it seems, attend that meeting, but he did attend the next meeting, which was held on the 8th of March, 1866. At the meeting of the 24th of February a contract was entered into to purchase the lands upon which the operations of this company were to be carried on, of a Mr. *Masterman*, for the sum of £3,325,000. That was the contract entered into on the 24th of February. The resolution to enter into it was read and confirmed at a meeting, which Mr. *Larking* did attend, on the 8th of March in the same year. It turns out that that contract for £3,325,000 was what is called, and what I understand, as "salted." That is, the directors, who were trustees on behalf of the company, who were bound to act with all that integrity and fair dealing towards the shareholders with which trustees are bound to act with regard to their *cestuis que trust*, thought themselves at liberty to put into their pockets a sum of £660,000, which has been proved to be the amount, being the difference between what they were to give for the property and that which they felt at liberty to charge their shareholders with. Part of the arrangement for carrying this into effect was by means of certain debentures or promissory notes, which were issued in that very month of March, 1866. They are

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promissory notes which have been the subject of adjudication by myself in *Ex parte Colborne and Strawbridge* (1), and those promissory notes or debentures are in the common form. They run thus: "The *Imperial Land Company of Marseilles, Limited*, hereby bind themselves and their successors to pay to bearer the principal sum of £20 on the 31st of March, 1872, such payment to be made at the *National Bank*," and so forth. I decided in that case that they were in point of fact promissory notes, and that every *bonâ fide* holder of those notes was entitled to stand as a creditor against the company. Mr. *Larking* says he comes within that definition, and that he has as much right to prove against the company as if he had never been a director. He was a director from the first meeting of the 24th of February, 1866, according to his statement, down to the 16th of December, 1867, when he says he resigned. But it happens that, before the date at which he says he resigned, the company had gone into voluntary liquidation; for the resolution, I find, was passed on the 22nd of August, 1867, and confirmed at the following meeting, on the 5th of September, 1867; and it is a very remarkable thing that the resolution proposed by the chairman was seconded by Mr. *Larking* on the 5th of September, 1867. He bought these debentures on the 24th and 25th of March, 1868, and he says, in his cross-examination, that he did not know the company was then in liquidation, and if he had, he should not have purchased them. So that, being a director who was party to moving or seconding a resolution to wind up the company voluntarily in the month of September, 1867, and buying these debentures in the month of March, 1868, he swears that he did not then know that the company was in liquidation. It is said that was a mere mistake of his. I assume it was; I do not propose to treat Mr. *Larking* as a person who intended to commit perjury, or as one who intended to commit, and has committed, a fraud. But it shews a want of care, a want of business habits, and a want of due appreciation of the position he had occupied, which I am very sorry to see.

Now, if every one of these debenture holders had paid £20, and the company was made to acknowledge itself indebted in that amount, something, I think, might have been said for it. But it

(1) Law Rep. 11 Eq. 478.

turns out that all these debentures, as part of the fraudulent scheme to cheat the shareholders, were issued to Mr. *Masterman*, not for value, but as part of that salting price of £660,000 of which the company was cheated by the conduct of their directors. Mr. *Larking*, as a director, had contributed by his conduct in leading these unfortunate shareholders into the disasters which have befallen them; and I am sorry to say, by the experience I have had of this company, now extending over very nearly eight years, that the money has been painfully extracted from many small traders, shopkeepers in *Ireland* and *Great Britain*, for the purpose of paying the debts of the company. Mr. *Larking*, who bought these debentures at 25 per cent. after the company had got into difficulties, after he knew it was in a state of disaster and ruin, raises the decent contention that he is at liberty to prove against these unfortunate shareholders for the full amount of the debentures. When the application came before me at the beginning of November, as soon as I saw the nature of the case I made a suggestion which ought to have been acted upon, namely, that under the circumstances (I did not know them all then), seeing he had been a director of the company, and knowing perfectly well that no man could have been a director of this company without having much to answer for, I suggested that both parties should concur in allowing Mr. *Larking* to stand as a creditor for the amount he had actually paid for these debentures, with interest; and I cannot but express my surprise that that offer which was made by the official liquidator, an offer which would meet every view of the justice of the case, which would have indemnified him against loss, and have given him a good investment at 5 per cent., was not accepted. I say I am surprised that a gentleman in the position of Mr. *Larking* should not have been satisfied with such an offer as that, but should have argued that these transactions, which have ended in the disaster into which he has led these shareholders, can be upheld, and that by buying up the debentures he is to turn them into a profit of 75 per cent.

What, then, is the position of Mr. *Larking?* The only question I have to decide here is, whether, under all the circumstances of the case, as against these shareholders, who were under his protection, and whom he has so lamentably failed to protect, he can

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extract from their pockets a profit of 75 per cent. upon these transactions. That he ought not to have made the attempt, I most emphatically express my opinion; that he cannot succeed in it, I equally emphatically express my opinion.

Then it is said that he did not know of this salting, and did not know that the money had been given to these fraudulent directors; but I must attribute to him as a director all the knowledge which by reasonable diligence he would have acquired, and by reasonable diligence he might have found out why it was that £3,325,000 was given for this property, which to the first purchasers had only cost £2,665,000.

He states in his deposition—"I asked for the contract, and could not get it." But a director who fails in his duty in not obtaining the information which reasonable diligence would furnish him with, cannot turn round and avail himself of his own want of care, prudence, and business habits, to obtain a profit to the disadvantage of those who are under his protection. He then stated, "I do not know as a matter of fact to whom the bonds I signed were given. I was not consulted by Mr. *Vallance* about the price to be paid for this property. I was ignorant of the purchase until I became a director" (that was the very second meeting of the directors). "I was told at *Marseilles* you are paying a high price for it. I never heard from the directors or other persons that a great part of the purchase-money was paid to persons other than the vendors, but I have heard so since. While I was a director of the company I heard a vague report" (observe this is a man who undertook to protect a large body of shareholders) "that money had been paid to the promoters." He heard a vague report. Was it not his duty to investigate the fact when he heard such report? Then this is his statement: "but I had no proof of it, and I cannot say from whom I heard it. This was about twelve months after the promotion of the company" (that is, therefore, in the early part of 1867), "and I don't think earlier than that. I did not investigate the matter, but said I will watch *Albert Grant* to see whether there is any truth in the story, and if I do, I will leave the company." He never investigated it, he never found it out, and he never left the company, but he continued to be a director to the very last day of its existence. This is the man who comes forward and gravely

argues this claim before me, having been guilty of a gross neglect of duties, to say nothing more, those duties which he owed the shareholders, many of whom had committed their all to the affairs of this company. He totally neglects his duty towards them, he allows them to be defrauded, because he never investigates the facts which he ought to have done; he totally fails in the performance of every part of his duty towards them, and when he knows that the company has fallen into ruin and disaster, that no shareholder has ever got a penny by his investment, and there is barely a possibility he ever can get a penny by it, that in all probability he will have to contribute every farthing for which he is liable, to pay the debts of the company—he thinks it then decent, at a time when he knew it was being wound up, to go and buy these debentures at 75 per cent. discount, and then comes here and contends that he is entitled to prove for the full value, and not for what he gave for them. I must attribute to him the knowledge which he ought to have acquired, and, therefore, I must attribute to him the knowledge that these debentures were corruptly and improperly issued. It is perfectly immaterial whether the whole of that salting money was got back or not. He was bound to know that these debentures were fraudulently and improperly issued. He says he would not have purchased them if he had known that the company was in liquidation, which it now turns out he did perfectly well know, because six months before he bought them he had actually been a party to seconding a resolution that the company should go into liquidation. Therefore, upon the ground of his knowledge that the debentures were improperly issued, and his knowledge that the company was in liquidation and insolvent when he bought them, on every principle he is deprived, in my opinion, of the right, if not to recover anything, at all events to recover more than the price he actually paid for them. He says that he ceased to be a director of the company upon his resignation on the 16th of December, 1867; but he could not divest himself of the character of a director at that time. The company was being wound up, he had incurred all the consequences of being a director before the 16th of December, 1867, and had been guilty of all these neglects of duty to which I have referred. He had been guilty of gross injustice towards his constituents, the share-

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holders, by failing in everything that he ought to have done to protect them against the misfortunes which have befallen them. Therefore I say it is neither decent nor proper, nor according to law, in my view, that he can traffic in these debentures, and make a profit of 75 per cent. by them.

There is another principle which appears to me conclusive against him, which has not been much argued by counsel; but it is a settled rule of this Court that no trustee who buys up an incumbrance upon an estate of which he is trustee can ever against the trust estate make a profit, and never can recover against the *cestui que trust* more than the price he gave for it. If a man who is a trustee of an estate buys up a mortgage upon it at 20 per cent., he can only get the 20 per cent., with interest upon what he paid. Here is a man, a director of a company, who is a trustee. He has all the obligations of a trustee to perform. Here is a case in which he knows the company is insolvent at the time, that it had actually come to a disastrous end when he bought these debentures, and on that principle alone he cannot make a profit by his trusteeship. To refer to what Mr. *Romer* said with regard to what might happen when a company is in a flourishing state, no doubt when a company is flourishing or solvent, any director may take the debentures of the company or do anything else; but when a company has so ended in disaster as this has, he cannot turn his office into profit at the expense of those whose interests he was bound to protect, but which he has entirely failed to protect. Therefore, considering that the company had become insolvent when he bought the debentures, upon that principle also I am clearly of opinion that he cannot be allowed to recover the full amount due upon the debentures, but he can only recover that, if anything, which he paid for them.

As it appears that this is an insolvent company, I think the Rules in Bankruptcy are also applicable to this case. Mr. *Larking* knew perfectly well, or was bound to know, that these debentures had been improperly issued, and being improperly issued during the time of his directorship, he bought them. He is not, therefore, a purchaser for value without notice; he takes them with all the knowlege which his position as a director gave him, and was bound not to neglect his duty. He states, I think, in his

cross-examination, that he did not make the necessary inquiries which would have led him to the conclusion that he had been a party to any improper issue of these debentures, but having been improperly issued he cannot make a profit of them after the company has got into insolvency.

Upon every ground, therefore, I come to the conclusion that he cannot be allowed to recover more than the amount which he paid for them, with interest thereon. I do not know whether the liquidators desire to withdraw the offer they made before, of allowing him to stand as a creditor for the amount paid.

The liquidators expressed their willingness to adhere to the offer already made.

MALINS, V.C.:—Will Mr. *Larking* accept it?

Romer said, in the absence of his leader he could not give an answer to the proposal.

MALINS, V.C.:—

You may consider it. If you accept the offer there is an end of the matter, but if you do not, I shall have the refusal inserted in the order:—"The liquidators being willing to allow Mr. *Larking* to stand as a creditor for the price which he paid for these bonds, namely, £587, with interest thereon from the date of the purchase, and he having declined that offer, disallow the claim altogether." I will allow Mr. *Larking* fourteen days to consider the matter. If the offer is accepted, Mr. *Larking* will pay his own costs only, and the liquidator must take his costs out of the estate. If the offer is refused, then the claim is dismissed with costs.

On a subsequent day it was stated that Mr. *Larking* declined the offer of the liquidators.

Mr. *Larking* appealed from this decision. C. A.

The appeal was heard on the 3rd of February, 1877, before *James*, L.J., *Brett*, J.A., and *Amphlett*, J.A.

J. Pearson, Q.C., and *Romer*, for the Appellant.

C. A.

1877

In re IMPERIAL LAND COMPANY OF MARSEILLES. *Ex parte* LARKING.

Glasse, Q.C., *Higgins*, Q.C., and *Wingfield*, for the liquidators.

Before the arguments were concluded the liquidators renewed their offer to pay the Appellant the amount of his purchase-money, with interest at £5 per cent. from the date of his purchase, which the Appellant accepted on the understanding that the money was to be paid in full, and that he was not merely to stand as a creditor for that sum. The case was therefore compromised on those terms. It was also agreed that there should be no costs on either side, either in the Court below or on the appeal.

JAMES, L.J.:—I wish to add that I entirely assent to the Vice-Chancellor's observations to the effect that, where a person sustains a fiduciary character, it is not the practice of the Court to allow him to make a profit by the transaction.

AMPHLETT, J.A.:—I quite agree with what the Lord Justice has said respecting persons in a fiduciary position.

Solicitor for Appellant: *G. M. Clements.*
Solicitors for Liquidators: *G. S. & H. Brandon.*

Ex parte WILLIAMSON.

M. R.
1876
Nov. 17.

Solicitor—Articled Clerk—Implied Cancellation of Articles by Mutual Consent —Five Years' Service—Reckoning detached Periods—6 & 7 Vict. c. 73, s. 13.

W. was articled in 1861 to *R.*, a solicitor, for five years, but left him after two years' service, the articles with *R.*'s consent being considered as cancelled. In 1864 he was "re-articled" to *R.* for the remaining three years, and under these new articles he continued in *R.*'s service for two years, when he left on account of ill-health and under medical advice. In 1869 he was "assigned and re-articled" by *R.* to, and served with, *L.* for the remaining one year.

An application by *W.* that the several periods of service under the three articles might be reckoned as constituting the full five years' service, was granted, it being *held* that both the first and second articles had been cancelled "by mutual consent," within sect. 13 of 6 & 7 Vict. c. 73.

Statement.

THIS was an application by *W. Williamson*, an articled clerk, that his several detached periods of service with a solicitor might be reckoned as amounting together to the five years for which he had been originally articled. In support of his application, *Williamson* filed an affidavit, in which he stated as follows:—

By an indenture dated the 2nd of December, 1861, he was duly articled to *Roberts*, a solicitor, for five years. He served with *Roberts* for one year eleven months and eight days, and then, on the 10th of November, 1863, "with *Roberts*' consent, the said articles were considered as cancelled," whereupon *Williamson* left his service, and entered a merchant's office in *Liverpool*, where he remained for seven or eight months. He then left that office, and remained without employment until September, 1864, when he applied to *Roberts* to allow him to return to him and complete his period of service, which *Roberts* agreed to do. Accordingly he re-entered *Roberts*' office, and subsequently, by an indenture dated the 24th of February, 1865, he was re-articled to *Roberts* for the period of three years and twenty-three days, being the remainder of the original five years. He continued in *Roberts*' service until the 5th of March, 1867, having thus served for a further period of two years and twelve days, his total service having been three

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years eleven months and twenty days. Being then out of health and under medical treatment, he was recommended change of air, and he accordingly left *Roberts'* service and spent some time at the seaside and on the Continent, after which he returned to *England* and remained unemployed until October, 1869, when, being desirous of continuing his service, and wishing to reside in a country district, he was, by an indenture dated the 26th of October, 1869, "assigned and re-articled" by *Roberts* to *Louis*, a solicitor of *Ruthin*, for the remainder of the five years, viz., twelve months and ten days. He remained with *Louis* during that period, which expired on the 5th of November, 1870, since which time he had remained without employment. The question was whether the first and second articles respectively had been cancelled "by mutual consent" within the 13th section of 6 & 7 Vict. c. 73 (1), so as to enable the service under the second and third articles to be reckoned as good service.

Argument.

C. H. Turner, for the applicant:—

I submit that this case is covered by the Act. From the evidence it is clear that the first articles were actually cancelled "by mutual consent," and I ask your Lordship to hold that under the circumstances—the clerk having left *Roberts'* service in March, 1867, through ill health, and having been subsequently "re-articled" by *Roberts* to *Louis*—there was a virtual cancellation of the second articles also "by mutual consent," as in *Ex parte*

(1) 6 & 7 Vict. c. 73, s. 13: "If any attorney or solicitor to or with whom any such person shall be so bound, shall happen to die before the expiration of the term for which such person shall be so bound, or shall discontinue or leave off practice as an attorney or solicitor, or if such contract shall by mutual consent of the parties be cancelled, or in case such clerk shall be legally discharged before the expiration of such term by any rule or order of the Court wherein such attorney or solicitor shall have been admitted, such clerk shall and may, in any of the said cases, be bound by another contract or other contracts in writing to serve as clerk to any other practising attorney or solicitor, or attorneys or solicitors, during the residue of the said term, and service under such second or other contract in manner hereinbefore mentioned shall be deemed and taken to be good and effectual provided that an affidavit be duly made and filed of the execution of such second or other contract or contracts within the time and in the manner hereinbefore directed, and subject to the like regulations with respect to the original contract and affidavit of the execution thereof."

Trenchard (1). I am not asking that any part of the time during which the clerk was absent may be counted as good service, as in *Ex parte Moses* (2).

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JESSEL, M.R. :—

Judgment.

I think it is sufficiently clear from the evidence that the first articles were cancelled by mutual consent. With regard to the second articles, I think the circumstances were such as to amount to a virtual cancellation "by mutual consent" within the Act, and I therefore grant the application.

Solicitors: *Lewis & Indermaur.*

CUDDON *v.* CUDDON.

M. R 1876 *Dec.* 20.

[1876 C. 404.]

Succession Duty—Settlement of Reversionary Interest in Personalty—Payment by Tenant for Life—Right to Repayment out of Corpus—Succession Duty Act (16 & 17 *Vict. c.* 51), *s.* 32.

Where a person absolutely entitled to a reversionary interest in personalty settled the same on the usual trusts of a marriage settlement, and, on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys :—

Held, that, having regard to sect. 32 of the *Succession Duty Act* (16 & 17 Vict. c. 51), he was entitled to be recouped out of the corpus of the settled fund.

DEMURRER.

Statement.

By indentures made in 1851 on the marriage of the Plaintiff, *F. T. Cuddon*, certain funds to which the Plaintiff was absolutely entitled in reversion, subject to certain life interests therein, were assigned to the Defendant, *James Cuddon*, as trustee, upon trust for the Plaintiff for his life, or until he should cease to be entitled to the personal enjoyment thereof, and after his decease, or upon his ceasing to be entitled to the personal enjoyment thereof, upon

(1) Law Rep. 9 Q. B. 406. (2) Law Rep. 9 Q. B. 1.

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trust for Mrs. *Cuddon* for life, and after her decease, upon trust for the children and issue of the marriage as the Plaintiff and his wife and the survivor of them should appoint, and in default of appointment, upon trust for the child or children of the marriage as in the settlement mentioned.

Upon the termination of the prior life interests succession duty at the rate of 10 per cent. became payable upon the trust funds, and in 1871 the Plaintiff paid the same, amounting to £1959 17*s.*, out of his own moneys.

The statement of claim alleged that the Plaintiff, when he paid the succession duty, had some intention, if he should afterwards find that he could conveniently do so, of not requiring the repayment of the money so paid by him, and in consequence thereof the said payments were carried to a suspense account in his cash-book. Finding, however, that he could not conveniently forego requiring the repayment, and being desirous of being repaid the £1959, he requested the said Defendant to raise the sum out of the fund and pay it to him, but the Defendant declined to do so, except under the direction of the Court, on the ground that the payment by the Plaintiff was voluntary and to be regarded as an advancement for the benefit of his wife and children.

The Plaintiff claimed that it might be declared that he was entitled to be repaid the said sum, and that the said Defendant might be directed to raise it out of the trust funds.

The Defendants, the trustee, and the beneficiaries under the settlement, demurred.

Argument.

Romer, in support of the demurrer:—

The payment by the Plaintiff of the succession duty was voluntary, and can be only regarded as an advance for the benefit of those entitled under the settlement.

Bush, for the Plaintiff:—

The succession duty which became payable when the reversionary interest came into possession was payable out of the capital of the fund, and the Plaintiff, having paid it himself out of his own moneys, is entitled to be recouped, even if he at first intended not to demand it.

JESSEL, M.R.:—

I think it is clear that this demurrer cannot be sustained. When the reversion comprised in the settlement fell in, the whole of the duty on the trust fund became payable by the Plaintiff, who happened to be the successor. He paid the whole duty, as he alleges, out of his own moneys, and now the question is, whether, under the circumstances, he is entitled to repayment out of the fund.

I am of opinion that he is. By sect. 32 of the *Succession Duty Act* personal property settled upon different persons in succession is to be treated for the purposes of the Act as if it were bequeathed by the predecessor to the successor. If the section is to be taken, as I think it must, to mean that the duty shall be payable by the same persons in the case of a succession as in the case of a legacy, then the trustees of the settlement were liable to pay it.

I think the Legislature meant to impose the liability to pay the duty on personal property in settlement, not only on the different persons beneficially interested in succession, but also on the trustees of the settlement in the same manner as on the trustees of a will. In other words, the duty was to be a charge on the capital. Where a tenant for life discharges an incumbrance on the capital instead of merely keeping down the interest, the presumption is that it is done for the benefit of the remainderman, and he is entitled to a charge on the capital for the amount he has thus paid, though that presumption may, of course, be rebutted. In the present case there are no sufficient circumstances to convert the Plaintiff's payment into a gift for the benefit of his wife and children. He is, therefore, entitled to be recouped, and the demurrer must be overruled.

Solicitors: *Ward, Mills, Witham, & Lambert.*

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Dec. 21.

FURNESS *v.* BOOTH.

[1876 F. 111.]

Practice—"Counter-claim" between co-Defendants—Notice to co-Defendant by delivery of Pleading—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order* XVI., *r.* 17; *Order* XXII., *r.* 5.

Questions between co-Defendants may be raised by a pleading which states both a defence as against the Plaintiff and a claim against a co-Defendant, but such pleading is not a counter-claim under Order XXII., rule 5, and should not be so intituled.

Delivery of such pleading to the co-Defendant is sufficient notice under Order XVI., rule 17.

Shephard v. *Beane* (1) not followed.

Statement.

THIS was an action for an injunction to restrain one *Booth* and his five tenants from permitting foul water or sewage to flow from five houses belonging to *Booth* at *Harlesden Green* into a watercourse claimed by the Plaintiff.

Clark, one of the five tenants, delivered to the Plaintiff, and also to his co-Defendant *Booth*, a defence and counter-claim, entitled "*Furness* v. *Booth*, and *Clark* v. *Booth* by counter-claim," denying the Plaintiff's title to the watercourse and the fact of the nuisance, and making a "counter-claim" against *Booth*, averring a covenant on his part for quiet enjoyment, and claiming indemnity from him against any damages and costs which he, *Clark*, might be ordered to pay to the Plaintiffs.

Argument.

Maidlow, for the Plaintiff, now moved to strike out so much of the defence and counter-claim as consisted of the counter-claim, and that *Clark* might be ordered to pay the costs thereby occasioned.

W. B. Heath, for the Defendant *Clark*:—

I submit that the proper mode of raising the question between me and my co-Defendant is by "counter-claim," under Rules of Court, 1875, Order XXII., rule 5.

Shephard v. *Beane* (1), before Vice-Chancellor *Hall*, expressly

(1) 2 Ch. D. 223.

lays down that questions between co-Defendants should be raised by "counter-claim," and delivery of it to the co-Defendants.

[*Cookson*, Q.C., as *amicus curiæ*:—In *Warner* v. *Twining* (1) your Lordship held, on the contrary, that no counter-claim could be set up which did not seek relief against the Plaintiff.]

Argument.

At all events, this "counter-claim" can only be wrong in form. We have, in substance, claimed by our pleading relief against our co-Defendant, and the delivery of the counter-claim may be treated as service of notice of our claim under the *Judicature Act*, 1873, s. 24, sub-s. 3, which enables the Court to grant to any Defendant the relief claimed by his pleading against the Plaintiff or "against any other person, whether already a party or not, who shall have been duly served with notice in writing of such claim."

JESSEL, M.R.:—

Judgment.

A pleading which asks no cross relief against a Plaintiff either alone or with some other person is not a "counter-claim," and, therefore, does not fall within Order XXII., rule 5. Under the *Judicature Act*, 1873, s. 24, sub-s. 3, the relief sought by the Defendant *Clark* against his co-Defendant required to be pleaded, and it was necessary to give notice of the pleading to the co-Defendant under the Act, and Order XVI., rule 17. I think delivery of the pleading to a person already a Defendant is sufficient notice under that Order. I shall, therefore, only order the word "counter-claim" to be struck out, and treat the delivery of this pleading as a notice to the co-Defendant *Booth*. With regard to the case of *Shephard* v. *Beane* (2), I do not think the Vice-Chancellor intended to lay down that a "counter-claim" is the right form of such a pleading as between co-Defendants. He does not, in fact, use the word in his decision, and it seems to me, therefore, that the head-note of the case is incorrect in so laying it down. However, it stands as a reported decision in your favour, Mr. *Heath*, and therefore I shall not make you bear the costs of this application.

Solicitors for Plaintiffs: *Morris, Stone, Townson, & Morris.*
Solicitors for Defendant *Clark*: *Carr, Fulton, & Carr.*

(1) 24 W. R. 536. (2) 2 Ch. D. 223.

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BENTLEY *v.* ROTHERHAM AND KIMBERWORTH LOCAL BOARD OF HEALTH.

[1876 B. 550.]

Local Act — Corporation — Limiting Time for Compulsory Powers — Notice to treat — "Prolongation" by second Act of Powers expired under former Act — Construction of Acts, Principles of — Injunction.

A special Act, passed in 1863, empowered a local board to construct waterworks and establish markets, and, with the consent of the ratepayers first obtained, to purchase compulsorily certain lands, including lands belonging to the Plaintiff, for those purposes: provided that the compulsory powers should not be exercised after the expiration of seven years from the passing of the Act. The seven years expired in July, 1870, the ratepayers having shortly before authorized the board to purchase the Plaintiff's property for the purpose of a market. In August, 1870, the board obtained a second Act "to extend the time for the compulsory purchase of lands and completion of the waterworks, and to authorize them to construct gasworks, and for other purposes." After reciting that "the time limited by the Act of 1863 had expired, and that it was expedient that such time, and also the time limited by the former Act for the construction of waterworks, should be extended," it was enacted (sect. 5) that "the time limited by the Act of 1863 for the compulsory purchase of lands should be prolonged and extended to the period of three years from the passing of this Act." The Act contained no express reference to markets, but provisions relating only to the construction of waterworks and gasworks.

In December, 1870, the board served the Plaintiff with notice to treat in respect of his property, and ultimately, in July, 1876,—the parties having failed to agree,—with notice of their intention to summon a jury to assess compensation, whereupon the Plaintiff moved for an injunction to restrain the board from proceeding before a jury and taking his property otherwise than by agreement, on the ground, 1, that the time for the exercise of their compulsory powers under the first Act having expired, could not be "prolonged and extended" by the second Act; 2, that whatever compulsory powers were vested in the board by the second Act related only to lands required for the express purposes of that Act, namely, the construction of waterworks and gasworks; and, 3, that, at all events, these were new powers, and, if applicable to lands required for markets, could only be exercised with a new consent on the part of the ratepayers first obtained.

Motion refused with costs.

Principles of construction of Acts of Parliament considered.

Statement.

BY the *Rotherham and Kimberworth Local Board of Health Act*, 1863,—which received the Royal Assent on the 13th of July, 1863,

—after reciting that the objects of the Act were to enable the local board to construct waterworks for the district, and also to purchase the existing markets and fairs and establish new ones within the district, it was enacted (sect. 4) that "subject and according to the provisions of this Act and of the Acts incorporated therewith" (including the *Lands Clauses Consolidation Act*, 1845) "the board may, with or without the consent of the respective owners or occupiers of any lands described in the deposited plans and book of reference, enter upon, purchase, take, and use those lands or any of them, or any right or easement in or over the same or any of them"; (sect. 8) that "The powers of the board for the compulsory purchase or taking of lands for the purposes of this Act shall not be exercised after the expiration of seven years from the passing of this Act."

The Act then empowered the board to construct waterworks, to be completed within ten years from the passing of the Act; and to purchase and take *Rotherham Market Place* with or without the consent of the company of proprietors: and sect. 86 enacted as follows:—

"Notwithstanding anything in this Act, it shall not be lawful for the board (as between the board on the one hand and the owners and ratepayers of the district on the other) to purchase or take for any estate or interest whatever any of the lands described in the deposited plans and book of reference" (with certain exceptions unnecessary to be stated) "without the consent first obtained of the owners and ratepayers of the township of *Rotherham*, to be expressed by resolution in the manner provided in the *Local Government Act*, 1858, with respect to resolutions for the adoption of that Act . . . ."

The Act then contained various provisions enabling the board "from time to time" to enlarge or change the sites of existing markets and establish new markets, "as they should think fit or requisite," and to purchase land for such purposes, in addition to any land authorized to be purchased or taken by them under any of the foregoing provisions.

Among the lands described in the deposited plans and book of reference was a freehold public house belonging to the Plain-

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tiff, called the *Nag's Head*, situate in or near *Rotherham Market Place.*

The local board having under their Act become the owners of *Rotherham Market*, and the Plaintiff's property being required by them for the purpose of enlarging and improving the market place, a meeting of the ratepayers of the town was held on the 28th of March, 1870, at which a resolution was passed in accordance with sect. 86 of the Local Act, authorizing the board to purchase the property.

No further steps were taken by the board towards acquiring the property prior to the 13th of July, 1870, on which day the seven years limited by the 8th section of the Act for the compulsory purchase of lands expired.

The board then obtained another Act,—the *Rotherham and Kimberworth Local Board of Health Act*, 1870,—which received the Royal Assent on the 1st of August, 1870. It was intituled "An Act to extend the time for the compulsory purchase of lands and completion of the waterworks authorized by the Act of 1863; and to authorize the said board to construct gasworks, and to purchase the undertaking of the *Rotherham Gas Company;* and to authorize various agreements with respect to water and gas; and for other purposes." It recited that by the Act of 1863 the board "were authorized to purchase the lands and to construct the waterworks therein described, and that the same are now in course of completion:" that "the time limited by the said Act for the compulsory purchase of lands will (*sic*) expire in the month of July, 1870, and it is expedient that such time, and also the time limited by the said Act for the construction of the said waterworks should be extended;" and further, that the undertaking of the *Rotherham Market Company* having become vested in the board under the Act of 1863, it was intended that the Act should provide for winding up the affairs of the company.

The Act then contained the following enactments:—

Sect. 2 incorporated, among other Acts, the *Lands Clauses Consolidation Act*, 1845, except the provisions thereof with respect to the purchase of lands otherwise than by agreement.

Sect. 5. "The time limited by the Act of 1863 for the compulsory purchase and taking of lands, except lands authorized to

be taken for the *Ulley Reservoir*, shall be prolonged and extended to the period of three years from the passing of this Act, but so that such powers shall not be exercised after the expiration of such three years."

By sect. 6 the time limited by the Act of 1863 for the completion of the works thereby authorized was enlarged and extended for a further period of seven years. Beyond certain provisions for winding up the *Rotherham Market Company*, the Act contained no express reference to markets, its provisions relating in terms exclusively to the construction of waterworks and gasworks.

Statement.

On the 10th of December, 1870, the board served the Plaintiff with a notice to treat in respect of his property, such notice purporting to be "in execution of the powers and provisions contained in the *Lands Clauses Consolidation Act*, 1845, and the two Local Acts."

The parties being unable to agree as to the amount of the purchase-money and compensation, the board ultimately, on the 8th of July, 1876, served the Plaintiff with a notice of their intention to summon a jury to assess compensation, whereupon the Plaintiff issued a writ, and now moved for an injunction to restrain the board from proceeding before a jury, and from taking his property without his consent, on the ground that they had no longer power to take lands for markets otherwise than by agreement.

Argument.

Chitty, Q.C., and *W. S. Owen*, for the Plaintiff:—

The board's compulsory powers under their first Act having expired on the 13th of July, 1870, that is, before the passing of the second Act, we submit that they had no power to take our property compulsorily under the latter Act, inasmuch as, first, powers which had ceased to exist could not be "prolonged and extended"; secondly, whatever compulsory powers were vested in the board by the second Act related only to lands required for the express purposes of that Act, as explained by the title and preamble, namely, the construction of waterworks and gasworks, to which alone the Act applies, for it contains no reference whatever to markets beyond a provision for winding up the old market company; and, thirdly, in any case, the powers conferred upon the board by the second Act are new powers, and if applicable to

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lands required for markets, can only be exercised with a new consent on the part of the ratepayers to be first obtained, the old consent having expired with the old powers.

Argument.

Although the notice to treat was served so long ago as December, 1870, yet, having regard to your Lordship's decision in *Ystalyfera Iron Company* v. *Neath and Brecon Railway Company* (1), it seems useless now to argue—even admitting it to have been a valid notice—that it has been abandoned or annulled by lapse of time.

Fooks, Q.C., and *Russell Roberts*, for the Defendants, were not called upon.

Judgment.

JESSEL, M.R.:—

I am in your favour, Mr. *Fooks*. It is my duty on a motion of this kind, no doubt, to decide a mere question of law, and the points raised are mere questions of law. The first question is a very simple one. It is whether the second Act is to have its enacting terms, which are clear and beyond dispute, controlled by reference to a recital of the contents of it. Now, no doubt it is well established, as a rule in the construction of statutes, that where the enacting part is clear and unambiguous, you are not to control it by a reference to the recitals; but that where the enacting part is ambiguous, you may explain it by reference to the recitals. Again, there is no doubt a rule, applicable to Acts of Parliament as well as to other legal instruments, that you may control the plainest words by a reference to the context. But then, as has been said very often, you must have a context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled. Now, applying either or both of the rules to the case before me, it seems to me that there is nothing which enables me to depart from the literal meaning of the Act of Parliament. The first Act enabled the Local Board of *Rotherham* to do a great many things—among others, to enlarge markets—and it gave them power to take property in the district compulsorily, a power which expired in July, 1870, and it authorized them to exercise that power as regards the lands in question only

(1) Law Rep. 17 Eq. 142.

with the consent, or rather not without the consent, first obtained, of the owners and ratepayers of the township of *Rotherham*, to be expressed by resolution. The second Act, which was passed in August, 1870,—therefore after the time for compulsory purchase had expired,—contains this enactment in the 5th section. "The time limited by the Act of 1863 for the compulsory purchase and taking of lands" (with a certain exception which it is not material to mention) "shall be prolonged and extended to the period of three years from the passing of this Act, but so that such powers shall not be exercised after the expiration of such three years." Now, there is no difficulty in saying that, standing alone, that enactment is plain, clear, and without doubt or ambiguity. It simply extends the time for the compulsory purchase and taking of lands. These lands, it is admitted, were within the deposited plans and book of reference of the original Act; they were lands which the corporation were authorized to take compulsorily, and the time for so taking them is extended. Standing alone, therefore, there is no doubt that that section applies to these lands, that is, it extends the time for purchasing any lands.

But it is said this section does not apply to the lands for the market, because there are other parts of the Act which shew that it is not to extend to lands to be acquired for any other purposes but waterworks and gasworks. As to gasworks, that is a new thing altogether—they were not provided for by the first Act.

Now, I was first of all referred to the title of the second Act. I think the title throws very little light upon the subject; still it does not appear to me to be restrictive in any way, for, after mentioning the special objects of the Act, it adds "and for other purposes.' Then, do the recitals assist one at all? [His Lordship read them, and continued:—] It does not appear to me that there is anything in these recitals from which much assistance is to be obtained in construing the Acts. It is said that there is no recital at all as regards the market. That is true in a sense; there is no recital about it, except as to winding up the company of proprietors of the *Rotherham Market Place*, as to which there are some provisions. But I am not aware that you want more recitals than the recitals you have: "And whereas the time limited by the said Act for the compulsory purchase of lands will expire in the month of July,

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1870" (the "will" is no doubt explained by the fact that the word was put in while the bill was before Parliament, and before it became an Act), "and it is expedient that such time, and also the time limited by the said Act for the construction of the said waterworks, should be extended." That is, the recital shews that one of the purposes of the Act was to extend the time. I do not see that you want any more.

Then I am told that the other sections of the Act apply to waterworks, gasworks, and the *Rotherham Market*. Why should they not? If the 5th section of the Act extends the time, that is all you want. You do not require to have other sections stating what you may do with the land, because that is provided for by the former Act. If the time for the purchase is prolonged, all the previous sections of the former Act stating what you are to do with the land, and what buildings you are to erect on it, remain.

The 6th section, prolonging the time limiting the completion of the works, applies only to the waterworks—not the works for the market, which are to be executed from time to time as the board think fit.

That being so, it appears to me that the literal reading of the 5th section is the right one, and that the powers of compulsory purchase were prolonged until three years from the passing of the Act of 1870, namely, until August, 1873.

Now, the other point taken is a very singular one. The consent of the ratepayers to the exercise of the powers as regards the lands in question was duly obtained during the first Act. Consequently the powers then became exerciseable. The corporation were not to exercise the powers "without the consent first obtained of the owners and ratepayers." Those are the words. Therefore the moment the consent was obtained, the powers became exerciseable under the first Act. The powers themselves, therefore, after the consent was obtained, were simply powers to take the lands by compulsory purchase, and so they remained. But it is said that although they might be prolonged and extended, they were not prolonged and extended as they were, because they had been allowed to expire. I cannot accede to that argument. The words "prolonged and extended" shew that the powers themselves are to go on. No doubt, in a sense, they are new powers,

because every extension of a power is a new power; but when you have the time prolonged and extended, it is for the exercise of such powers. What is extended is the "time" for the compulsory purchase: the power to purchase was acquired before, and the same argument would destroy any exercise of the power whatever. Supposing the power had been originally given without requiring this consent, then the argument would have made the second Act a nullity, because it is only the "time" that is extended. In every case in which the power had ceased to be exercised before the passing of the second Act, it would be said it cannot be extended, because it has ceased, which would have the effect of reducing the 5th section to a nullity. That section, therefore, is not confined to a case like this, where previous consent is required, but it really applies, as I have said before, to every case. When Parliament uses the words "prolong and extend," the time is extended, or the power, where the time has expired. I cannot for a moment accede to the argument that it does not extend the power. Of course it does. As I have already said, the consent having once been given, those powers were free from the restriction as to obtaining consent.

The remaining point was only noticed to be given up. It was quite a sufficient exercise of the powers if notice was given within the time—as it was—after the passing of the second Act.

I therefore refuse this motion, with costs.

Solicitors for Plaintiffs: *Belfrage & Middleton*, agents for *Burdekin & Co., Sheffield.*

Solicitors for Defendants: *Stevens & Co.*, agents for *Whitfield & Packwood, Rotherham.*

M. R.
1877
Jan. 11.

Ex parte JOYCE.

Solicitor—Articled Clerk—Actual Service—Agreement as to Future Partnership—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73).

J., an articled clerk with a fixed salary, agreed with *S.*, the solicitor whom he was serving, to receive all the profits of the business, and to account to him for them at the expiration of the articles, and if they should go into partnership on *J.* being admitted, that *S.* should have the amount of such profits as his share of the capital. The business, most of which was introduced through *J.'s* connection, was managed by him on this footing, he receiving and paying all moneys, and his name appearing outside the office door. On the completion of his term of service, *J.* applied to be admitted to the final examination, but the examiners considered that the provisions as to service in the *Attorneys and Solicitors Act* had not been complied with:—

Held, that, on the evidence in the case, there had been actual service during the term of the articles within the meaning of the Act, and that *J.* should be admitted to the examination.

Statement.

THIS was a motion on behalf of *J. G. Joyce*, an articled clerk, that the examiners might be directed to receive him for the final examination with a view to his admission to practice as a solicitor.

The applicant had been for a considerable time managing clerk to *J. Trail*, in the *Temple*, who acted as *London* agent to *H. Cockle*, of *Deptford*. In 1870 *Trail* died, and then the applicant, with the view of keeping up his connection, became clerk to *Cockle*, who commenced business in the *Temple* in *Trail's* former office, as well as at *Deptford*, and agreed to give him his articles and £150 a year, the arrangement being that *Cockle* was to receive the profits of the business until the applicant was admitted. The applicant had the management of the *London* business.

In 1871 the applicant obtained an order from the Court of Queen's Bench dispensing with the preliminary examination.

On the 2nd of August, 1873, articles were entered into between the applicant and *Cockle* for three years on the basis of the two years' antecedent service. On the 17th of April, 1875, *Cockle* died, and on the 4th of May, 1875, the applicant entered into a verbal contract with *H. Stirke*, a solicitor at *Peckham*, for service

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Ex parte JOYCE.

for fifteen months, to make up the full term of three years under the articles, and it was agreed that his salary should continue at the same rate. Upon this *Stirke's* business was nominally carried on in *Devereux Court, Temple*, as well as at *Peckham*, and the applicant attended there and had his name painted outside the door. It was arranged that the applicant should receive and pay all moneys connected with the business, that the banking account should be kept in the applicant's name, that the applicant should account to *Stirke* for all moneys when admitted, that meanwhile *Stirke* should take as little as possible out of the business, that, when the applicant was admitted, the sum for which he would be liable to account should, in the event of their entering into partnership, be available as *Stirke's* share of the capital, and, if not, then that sum should be paid over to him, and that *Stirke* would not do business for clients introduced by *Joyce*.

Statement.

In September, 1876, the three years' service expired, and the applicant gave notice to the *Incorporated Law Society* of his intention to go in for his final examination. The examiners investigated the case, and came to the conclusion, on the evidence before them, that the service to *Stirke* was merely colourable, and that the applicant was in reality carrying on business for his own benefit. They declined, therefore, to admit him to the examination.

Upon the hearing of the motion the applicant and *Stirke* were examined, and they both deposed that the agreement between them was to the effect before stated, and that the business had been carried on on that footing.

Fischer, Q.C., and *Owen*, for the applicant, contended that the provisions of the *Attorneys and Solicitors Act* as to service had been complied with, and that he was entitled to be admitted to the examination.

Argument.

They referred to *In re Mills* (1).

Cookson, Q.C., and *W. Murray*, for the *Incorporated Law Society*, contended that there had not been *bonâ fide* service as required by the Act, and that the examiners were justified in refusing to let the applicant go in for his examination.

(1) 33 L. J. (Q.B.) 191, n.

M. R. 1877 *Ex parte* JOYCE. Judgment.

JESSEL, M.R.:—

The applicant should have been very careful to have put the arrangement which was come to into writing, and to have had it signed and carefully adhered to: if he had done that, possibly much of the difficulty which has arisen might have been obviated.

I am not aware of any law which prohibits an articled clerk, who has a connection of his own fairly acquired, from saying to a solicitor, "I will become your articled clerk upon these terms: you shall pay me a salary, you shall have for your own benefit the profits of all the business which I shall introduce to you until I myself become admitted, and you will agree that when I become admitted you will not transact any business for those clients whom I so introduced to you, but you will leave to me the entire business which I so introduced." If that was the arrangement, I know no law to prohibit it. Nor does it make any difference if there is this variation: "Instead of your retaining these profits for yourself, if we agree to go into partnership at the end of the period of my articles when I become admitted, these profits shall form my share of the capital of the partnership, and you and I will go into the partnership upon terms to be agreed upon," which is the other alternative. Here it is sworn, and I think sworn truly, both by Mr. *Stirke* and Mr. *Joyce*, that that was the arrangement they made between them.

Mr. *Joyce*, the articled clerk, had no interest in the business during the articles except his salary, and the contingency of retaining the clients whom he introduced during the articles if he afterwards became admitted. It appears to me that the business was Mr. *Stirke's* really and truly as well as theoretically, and not Mr. *Joyce's*, within the rule; and that being so, Mr. *Joyce* was the clerk, and not the proprietor of the business. As regards actual service, what the law requires is service, that is, the attendance of the clerk during office hours at the master's office, performing the ordinary duties of a clerk. It does not require that the master should know more law than the clerk, it does not require that a service, to be a good service, should be the service of a man who learns law of his principal; it may well be, and with great respect to the great body of solicitors, it does sometimes happen, that an experienced articled clerk does know more law, especially if he

has been many years in the profession, than a very young solicitor; it does sometimes happen that a man who has been managing clerk for many years engaged in large transactions, and carrying on a large business for solicitors, may know more law, and may probably be able to conduct business better, than a man who has only been a few years admitted as a solicitor.

Notwithstanding all that, it is service. The law only requires that the clerk shall attend at the office and conduct business under the direction of the master. That being so, it appears to me that Mr. *Joyce* has literally complied with the law. I am satisfied he intended to comply with it, because that is the real point I have to decide, and not to evade the law. I think that he really did intend to remain as clerk during the period he was compelled to be a clerk, and to become a master as soon as the law would allow him to become a master.

Under these circumstances I shall make the order that he be admitted to his examination. But, inasmuch as I cannot help seeing that there has been a cause for the suspicion entertained, and, it appears to me, fairly and justly entertained, by the examiners as to the *bona fides* of the transaction, and they were fully justified in requiring a judicial investigation and decision before admitting him to the examination, I think it would only be a protection to the society which assists me in carrying on that portion of my duty which relates to the admission of articled clerks as solicitors, to say that in making this order I shall depart from the usual course in cases of this sort by making the order without costs.

Solicitors: *H. Stirke; E. W. Williamson.*

M. R.

1877

Feb. 3.

In re KERR'S TRUSTS.

Power of Appointment—Testamentary Appointment of Fund in Joint Tenancy—Excessive Execution—"Children"—Illegitimate Children—Intention—Reading Tenancy in Common—Gift in Default of Appointment—No Hotchpot Clause.

K. by his will gave a fund upon trust for such of the "children" of his daughter *M.* (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. *M.* had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children *E.* and *C.*, their executors, administrators, and assigns, for their own use and benefit." *E.* was one of the illegitimate and *C.* one of the legitimate children :—

Held, reading *M.'s* testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to *C.* under the appointment, and that the other moiety, *E.* not being an object of the power, was divisible among all the legitimate children, as in default of appointment.

Humphrey v. *Tayleur* (1) and *Alexander* v. *Alexander* (2) discussed.

Statement.

DAVID KERR, who died on the 28th of March, 1863, by his will, dated the 16th of June, 1862, gave his residuary estate to trustees, to stand possessed of one-third part thereof, after the respective deceases of his daughter *Maria Charlotte Young* and her husband *David James Young*, upon trust for all and every such one or more exclusively of the other or others of the children of his said daughter *Maria Charlotte Young* or the issue (born in the lifetime of his said daughter) of any such child or children as the survivor of them the said *David James Young* and *Maria Charlotte Young* should by will appoint, and in default of such appointment, and so far as any such, if incomplete, should not extend, in trust for all and every the child and children of his said daughter *Maria Charlotte Young*, in equal shares.

The will contained no hotchpot clause.

Mrs. *Young* survived her husband, by whom she had several children, some of them being illegitimate, having been born before her marriage, and by her will, dated the 24th of March, 1873, she, "in pursuance and in exercise of the power contained in the will

(1) Amb. 136. (2) 2 Ves. Sen. 640.

of her father, *David Kerr*, appointed all her right, title, and interest under the said will of, in, and to the estate of her said father unto her children *Charlotte Elizabeth* (then the wife of *William Nassau Morton*) and *Catherine Young*, their administrators and assigns, To hold the same unto and to the use of the said *Charlotte Elizabeth Morton* and *Catherine Young* for their own absolute use and benefit."

Statement.

The testatrix, Mrs. *Young*, died on the 29th of March, 1873, leaving her said two daughters, *Charlotte Elizabeth Morton* and *Catherine Young*, her surviving.

Charlotte Elizabeth Morton was one of Mrs. *Young's* illegitimate children. *Catherine Young* was the eldest legitimate child.

The trustees of the will of *David Kerr* having paid into Court, under the *Trustee Relief Act*, the trust fund in their hands representing the settled one-third share of their testator's residuary estate, a petition was now presented by *Catherine Young* for the payment out to her of the fund, on the ground that inasmuch as her mother's appointment was in terms to her, the Petitioner, and her reputed sister *Charlotte Elizabeth Morton*, as joint tenants, and had failed as to *Charlotte Elizabeth Morton* by reason of her illegitimacy, she, the Petitioner, had become entitled to the whole of the appointed fund.

Argument.

Oswald, for the Petitioner:—

I submit that the appointment created simply a joint tenancy, with all its incidents, including the *jus accrescendi*. It has been long settled that if an estate be limited to two persons jointly, the one being capable of taking and the other not, he who is capable takes the whole: *Humphrey* v. *Tayleur* (1).

[JESSEL, M.R.:—Has the rule ever been applied to appointments of personal estate under powers?]

In *Alexander* v. *Alexander* (2), where a power was given to a wife to appoint a fund by will among her children, and the wife made an appointment by will "to her son *Francis* and his wife and children," it was held by Sir *Thomas Clarke*, M.R., that *Francis*, being the only appointee capable of taking, took the whole.

(1) Amb. 136. (2) 2 Ves. Sen. 640.

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Argument.

[*Nugent, contrà*:—That decision is disapproved of by Lord *St. Leonards* in *Sugden's* Vendors and Purchasers (1), where he observes that the reasoning of the Master of the Rolls was "very artificial" and "not satisfactory."]

[JESSEL, M.R.:—*Alexander* v. *Alexander* (2) is not quite in point. There were various questions in that case, but the actual decision was, that under the particular circumstances, the son was entitled to the whole of the appointed fund. Sir *Thomas Clarke* read the will as if the words were, "to my son *Francis* and his wife and children, if they shall by law be capable." In saying that the reasoning was "very artificial" and "not satisfactory," Lord *St. Leonards* means to say it was unsound reasoning, and I agree with him. The Master of the Rolls had no right to put into the will the words he did. The decision in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. That decision has been overruled by later authorities.]

Oswald:—But Sir *Thomas Clarke* expressly follows the principle laid down in *Humphrey* v. *Tayleur* (3).

[JESSEL, M.R.:—What he says in *Alexander* v. *Alexander* is a mere *dictum*, and it is difficult to support a *dictum* when the decision is gone. With great deference to Sir *Thomas Clarke*, I do not see what *Humphrey* v. *Tayleur* had to do with the case before him. *Humphrey* v. *Tayleur* does not appear to have been decided on general law, but on the words of the codicil. Lord *Hardwicke* treats the codicil as if it had the effect of erasing the name of one of the original appointees.]

I ask your Lordship to read this will in the same way, treating it as if the testatrix had inserted the name of the illegitimate daughter by mistake. The testatrix, no doubt, thought that when she had a power of appointment among her "children," it included her illegitimate children. It is clear, however, that only legitimate children are objects of the power, *Hill* v. *Crook* (4), since

(1) 8th Ed. pp. 504, 505.
(2) 2 Ves Sen. 640
(3) Amb. 136.
(4) Law Rep. 6 H. L. 265.

there are no grounds here for including illegitimate children, such as existed in *Lepine* v. *Bean* (1).

M. R. 1877 *In re* KERR'S TRUSTS. Argument.

At all events, the appointment is good so far as regards the Petitioner, and I submit that under it she is entitled in any case to at least one half of the fund: *Short* v. *Smith* (2); *Eales* v. *Drake* (3).

Nugent, for two of the younger legitimate children claiming under the original gift over in default of appointment:—

With regard to the latter part of the Petitioner's argument, the precise share which she is to take cannot be defined from the terms of the appointment, assuming there is a joint-tenancy; and the rule is, that if the appointment be to persons as a class, some of whom are and some are not objects, and if it is impossible to define how much of the appointment falls within the power and how much without it, the whole appointment fails: *In re Brown's Trusts* (4), which is a case very similar to this. *Alexander* v. *Alexander* (5) is there referred to, but it is difficult to see how the two cases can stand together.

If your Lordship should be of opinion that the appointment is only partially and not altogether void, then the question is, how much of the fund has been properly appointed? Now when the testatrix gives a fund to two persons, her most probable intention is that it shall be divided between them, and, in the absence of any indication to the contrary, in equal shares. I ask your Lordship, therefore, to read the will as if the testatrix had directed an equal division, so as to bring the case within the principle of *Sadler* v. *Pratt* (6), the appointment being held void only as to the excess. The Petitioner will thus take one half of the fund under the appointment, and the other half will go as in default of appointment.

Oswald, in reply:—

If the appointment is read as an appointment to an object of the power and a stranger in equal shares, then it is clear that, the

(1) Law Rep. 10 Eq. 160.
(2) 4 East, 419.
(3) 1 Ch. D. 217.
(4) Law Rep. 1 Eq. 74.
(5) 2 Ves. Sen. 640.
(6) 5 Sim. 632.

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two gifts being separable, the gift to the stranger alone fails: *Farwell* on Powers (1); *Bruce* v. *Bruce* (2).

Macnaghten, for the trustees.

Judgment.

JESSEL, M.R.:—

The question I have to decide is one which comes before the Court for the first time, for it appears that no reported case is to be found which decides the point. The case is this: A lady has a power of appointment over a fund by will among her children. She makes a will appointing the fund to one child and to a stranger in such terms that the appointees, supposing the appointment to be good, take by law as joint tenants. But of course she cannot appoint to a stranger, and the question therefore arises, What is the effect of the appointment? Now, it has been argued most elaborately that I am bound to apply to this case the rules of tenure applicable to the disposal of real estate. But I am not satisfied that I am so bound. As regards the instrument of appointment itself, there can be no doubt that it is a proper exercise of a testamentary power, and there is also no doubt that in construing such an exercise of the power you are to have regard to the intention of the person exercising it. What is the intention of the person exercising the power in this case? It is, as I understand it, to give the fund to two persons after her death. No doubt the gift was in terms to those two persons as joint tenants, but still, in substance—assuming the appointment to be good—if they both survived her each would take a half. If it had been real estate it would have been said there was seisin not only *per tout*, but also *per mie*. That was no doubt the intention. Now, the rule is well settled, that where there is an excessive execution of a power—that is, where some of the appointees are not objects of the power—where you can ascertain the shares intended for the objects of the power, the objects take these shares and a stranger takes none. Of course it is clear that if the appointment is to two persons as tenants in common they each take a half. But cannot I ascertain here whether it was the intention of the testatrix that each of the appointees should take a half? I think I

(1) Page 245. (2) Law Rep. 11 Eq. 371.

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In re KERR'S TRUSTS.
Judgment.

can. For the reasons I have already stated, it appears to me that such was her real meaning. It is somewhat singular that the arguments on each side were mutually destructive. On the one side it was said, "The appointment being to joint tenants, and failing as to one of them, I, as the remaining appointee, take the whole." On the other side it was said, "We accept your argument that there is a joint tenancy, but as the testatrix evidently did not intend you to take the whole, and you cannot tell what your share is, if the appointment fails at all it fails altogether." I hope, however, I decide the case according to common sense, and according to what must have been the clear intention of the testatrix. That being so, there will be a declaration that the Petitioner is entitled to one half of the fund under the appointment, and that the other half goes as unappointed, and—there being no hotchpot clause in the will creating the power—is divisible between the Petitioner and the other lawful children of the testatrix.

Solicitors: *W. Sturt; T. H. Strangways; J. P. Sweetland.*

CARTER *v.* WAKE.

M. R.
1877
Feb. 12.

[1875 C. 48.]

Equitable Mortgage—Deposit—Canada Bonds—Pledgee of Chattels—Right of Foreclosure.

The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels.

A. deposited with *B.* certain *Canada* railway bonds as security for a debt. On bill filed by *B.* for foreclosure or sale:—

Held, that *B.* was entitled to an order for sale only.

Statement.

IN the year 1874 the Defendant mortgaged to the Plaintiff certain ships, and also deposited with him (without memorandum) certain bonds of the *Canada Southern Railway Company*, as security for a debt. These bonds are first mortgage bonds, redeemable at par in the year 1890, but at present at a considerable discount in the market.

The bill in this suit was filed in the year 1875, praying for the usual accounts, and for a sale of the ships, and foreclosure of the equity of redemption in the bonds; or, in the alternative, for

M. R. 1877 CARTER v. WAKE.

a sale of the whole. The ships had since been sold and the proceeds applied in reduction of the debt, leaving a sum of upwards of £4000 still due to the Plaintiff. It was stated that if the bonds were now sold, they would not produce enough to satisfy the debt, but that the Plaintiff had calculated that if he could foreclose the equity of redemption now, he could repay himself in full by waiting till the bonds were redeemed in due course.

The suit now came on for hearing on motion for decree.

Argument.

Miller, Q.C., and *T. L. Wilkinson*, for the Plaintiff, submitted that he was entitled to a foreclosure decree, just as in the case of an equitable mortgagee of land by deposit of deeds. They referred to *James* v. *James* (1).

The Defendant did not appear.

Judgment.

JESSEL, M.R.:—

The Plaintiff is in the position of a mere pledgee at law of certain chattels, and I do not think that a person in that position has the same right of foreclosure as a mortgagee by deposit of the title deeds of land. The principle upon which the Court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on. Then, when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title.

There will be an order for sale of the bonds by auction, but as there seems to be a good reason why the Plaintiff should not be forced to part with them, I will give him liberty to bid, he not conducting the sale.

Solicitors: *Allin & Greenop.*

(1) Law Rep. 16 Eq. 153.

HINKS & SON *v.* SAFETY LIGHTING COMPANY.

M. R.

1876

[1875 H. 286.]

Nov. 8; *Dec.* 13, 14.

Patent—Specification—Inconsistency between Claim and Description—Construction—"As described"—Insufficiency—Novelty.

Patentees of lamp-burners claimed by their specification as their invention the construction of burners "in the manner described and illustrated in the figures, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames."

The figures referred to shewed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old:—

Held, that the claim could not be read as limited to burners with a double-slotted cone, and that the patent was bad for want of novelty.

A description in the specification of a lamp-burner omitted to state where the hole for the admission of air was to be:—

Held, that the specification was insufficient.

Statement.

THIS was a suit by a company incorporated under the name of *James Hinks & Son, Limited*, against the *Safety Lighting Company*, to restrain an alleged infringement of the Plaintiffs' patent.

On the 18th of October, 1865, letters patent were granted to *James Hinks* and *Joseph Hinks* for certain improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons.

By the specification filed in pursuance of the said letters patent, on the 25th of October, 1866, the patentees described the nature of the invention and the manner in which it was to be performed as follows:—

"Our invention consists of the improvements hereinafter described in the burners of lamps for burning paraffin oil and other volatile liquid hydrocarbons, whereby two or more flat flames, or one circular or nearly circular flame, may be produced by the use of two or more single flat wicks. By the use of our invention the danger of breaking the chimneys which occurs from the use of a single flat wick is wholly removed, or much diminished, and in the case of curved wick cases or holders great facility in trimming and placing the wicks in the said cases or holders is obtained,

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Statement.

and a much greater length of the wick utilized than in ordinary Argand or circular burners.

"Our invention consists in the employment in the same burner of two or more flat or curved wick-cases or holders, in which said cases or holders single flat wicks are placed. Each of the said wick-cases is provided with an axis and pinions for raising and lowering the wick contained therein. The wick-cases or holders are either straight or slightly curved, or of the figure of semi-ellipses or semicircular, so as to produce, when arranged in the burner, flat or elliptical or circular flames. The cone or deflector has two or more straight or curved openings in it, through which the wicks may pass. That portion of the top of the cone between the curved openings (when curved openings and curved wick-holders are employed) serves as a substitute for the ordinary button used with circular wicks; or a circular hole may be used in the cone and the ordinary button employed. When flat wick-cases are employed, straight openings are made in the cone."

The patentees then described, by means of the drawings accompanying the specification, the manner in which the invention was to be performed. Figures 1, 2, 3, 4, and 5 illustrated burners in which two flat wicks placed in two flat or curved wick-cases were arranged so as to pass through two openings or slots in an enveloping cone. Figures 6, 7, 8, 9, 10, and 11 illustrated burners similar to Argand burners, except that two flat wicks placed in curved wick-cases were substituted for the usual Argand wicks and wick-cases.

The specification then contained the following paragraphs:—

"Having now described the nature of our invention and the manner in which the same is to be performed, we wish it to be understood that we do not limit ourselves to the precise details herein described and illustrated in the accompanying drawings, as the same may be varied without departing from the nature of our invention; but we claim as our invention of improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons,—

"Firstly, constructing the burners of the said lamps substantially in the manner hereinbefore described and illustrated in

figures 1, 2, 3, 4, and 5 of the accompanying drawings, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders, in which two or more flat wicks are placed so as to produce thereby two or more flat flames, or elliptical or nearly circular flames.

"Secondly, constructing the burners of the said lamps substantially in the manner hereinbefore described in figures 6, 7, 8, 9, 10, and 11 of the accompanying drawings, whereby a circular flame is produced by the use of two single flat wicks."

Messrs. *James* and *Joseph Hinks* carried on business as lamp manufacturers till 1873, under the name of *James Hinks & Son.*

In April, 1873, the company of *Hinks & Son, Limited,* of which Messrs. *James* and *Joseph Hinks* were the principal shareholders, was registered, and by an indenture dated the 29th of June, 1873, which was afterwards duly registered at the Patent Office, the patentees assigned to the Plaintiff company the said letters patent and the said invention, the subject thereof, and all rights and privileges thereby granted.

The bill alleged that the patentees, before the said assignment, and the Plaintiffs since the assignment, had manufactured and sold large numbers of lamps constructed according to the said invention, to which they gave the name of "The Patent Duplex Lamp;" that the lamps had acquired great repute, and that the invention was one of great public utility, and very valuable to the Plaintiffs as the owners thereof and the manufacturers of lamps made according to it.

The bill alleged that the Defendants were manufacturing and selling lamps which were a direct infringement of the Plaintiffs' patent, and prayed that they might be restrained by injunction.

The Defendants did not dispute the infringement, but alleged, among other grounds of defence, insufficiency and want of novelty in the Plaintiffs' specification.

One ground of defence arose thus: In 1871 *J. G. Rollins* purchased a large number of lamps with a double-wick lamp-burner and a single slot made according to an American patent taken out by *Halvorsen* dated the 20th of September, 1859, described in a volume of reports of the *United States* Patent Office for 1859,

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which had been received at the library of the Patent Office on the 31st of August, 1861, and then entered by the librarian in the catalogue. In September, 1871, Messrs. *James Hinks & Son* having seen an advertisement inserted by *Rollins* in the *Grocer*, a newspaper circulating amongst dealers in lamps, of the American double-wick burner, for which he invited orders, instructed their solicitors to write to *Rollins* warning him that the lamps referred to in the advertisement would be an infringement of their patent. They also put in advertisements in subsequent numbers of the *Grocer*, and sent a circular to their customers warning dealers in lamps against the threatened infringement. A correspondence took place between the parties, in the course of which *Rollins* intimated his belief that both the patents had been anticipated, so that both parties were interested in not raising a contest. As, however, no compromise was agreed to, and *Hinks & Son* still continued their advertisement, and sent out circulars respecting the American lamps, *Rollins* filed a bill to restrain the publication of the advertisement and circulars; and on a motion before Vice-Chancellor *Malins*, in the suit of *Rollins* v. *Hinks* (1), an injunction was granted. An appeal was threatened, and ultimately the parties came to terms, which were as follows:—That *Hinks & Son* should grant a free license to *Rollins*, and that *Rollins* should write a circular to the trade stating that he had accepted a license from *Hinks & Son* to sell his burner.

It was also contended that the patent had in part been anticipated by one *Little's* patent.

The case now came on for hearing. The issues raised by the Defendants were, want of novelty and insufficiency of the specification.

Each of the burners in the Plaintiffs' lamps, as manufactured, contained two wicks in parallel flat wick-cases in a cone or air deflector having a double slot. The scientific witnesses examined on the Plaintiffs' behalf gave evidence to the effect that a workman of average skill could, by studying the specification and drawings, make a burner of that description; also, that at the date of the letters patent the combination in question was novel.

(1) Law Rep. 13 Eq. 355.

On the other hand, the effect of the evidence of the Defendants' witnesses was that the specification only described a combination of two flat wick-cases with a cone having a single slot.

Matthews, Q.C., *Chitty*, Q.C., *Cracknall*, and *Macrory*, for the Plaintiffs:—

The evidence shews clearly that the language of the specification, coupled with the drawings, would enable a workman of ordinary skill to make such a burner as that patented by the Plaintiffs: *Plimpton* v. *Malcolmson* (1). The specification must be read as a whole and reasonably construed, and when it relates to an invention of acknowledged utility the Court will not adopt too strict a construction, the effect of which would be to vitiate the patent.

The novelty of the Plaintiffs' invention consists in causing two parallel flat flames to unite above the double slot if raised high enough. This is expressly claimed by the specification. The apparent ambiguity in the specification is occasioned by the reference to the other method of producing a circular flame through one slot, but our first claim is not a claim to every mode of using two flat wicks, but only a claim to the use of two flat wicks in a double-slotted cone, and that is new.

Aston, Q.C., and *Byrne*, for the Defendants:—

The Plaintiffs' specification is bad for ambiguity, inasmuch as there is no precise description of the alleged invention. It is also bad for want of novelty, in so far as it includes a cone with a single slot. *Halvorsen's* patent was for a burner with two flat wicks and a single-slotted cone, and that was published in this country in 1861. The burners imported and sold by *Rollins* were made after the specification of that patent, and as Messrs. *James & Joseph Hinks*, who are substantially the present Plaintiffs, at the time when the suit of *Rollins* v. *Hinks* (2) was instituted, alleged that those burners were an infringement of their patent, as they found that their patent, as they then construed it, had been anticipated by *Halvorsen's* patent, they cannot now claim, on another construction of the specification, the benefit of novelty in their invention.

(1) 3 Ch. D. 531. (2) Law Rep. 13 Eq. 355.

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Matthews, in reply, referred to *Harrison* v. *Anderston Foundry Company* (1).

JESSEL, M.R.:—

I am anxious, as I believe every Judge is who knows anything of patent law, to support honest *bonâ fide* inventors who have actually invented something novel and useful, and to prevent their patents from being overturned on mere technical objections, or on mere cavillings with the language of their specification so as to deprive the inventor of the benefit of his invention. This is sometimes called a "benevolent" mode of construction. Perhaps that is not the best term to use, but it may be described as construing a specification fairly, with a judicial anxiety to support a really useful invention if it can be supported on a reasonable construction of the patent. Beyond that the "benevolent" mode of construction does not go. It never was intended to make use of ambiguous expressions with a view of protecting that which was not intended to be protected by the patentee, and which has not been claimed to be so protected by him, whether or not it was an invention unknown to himself. It is for the patentee to tell the world that of which he claims a monopoly, to tell them, "You may do everything but this; but this you must not do, this is my invention."

With the view of getting this into a narrow compass, it has long been the practice of patent agents to insert in specifications the distinct claim of what they say is comprised in the patent, meaning that nothing else is comprised, that everything else is thrown open to the public, or, to put it in other words, if a man has described in his specification a dozen new inventions of the most useful character, but has chosen to confine his claim to one, he has given to the public the other eleven, and he has no right to be protected as regards any one of the other eleven if he wishes to recall that gift which he has made by publishing the specification.

Now, what is the Plaintiffs' patent for? It is for a burner for liquid hydrocarbons or paraffin oils. That is what the invention is for, and it is no doubt a burner which, in the attempt to put it

(1) 1 App. Cas. 574.

in use, is one which has proved very successful and highly useful. On that there is no contest. It is thus described in the specification: "Our invention consists in the employment in the same burner of two or more flat or curved wick-cases or holders, in which said cases or holders single flat wicks are placed"—that is what the invention is.—"Each of the said wick-cases is provided with an axis and pinions for raising and lowering the wick contained therein. The wick-cases or holders are either straight, or slightly curved, or of the figure of semi-ellipses or semicircular, so as to produce, when arranged in the burner, flat or elliptical or circular flames."

There is a great difficulty in knowing exactly what that means—I mean as regards the "elliptical or circular flames." "The cone or deflector has two or more straight or curved openings in it through which the wicks may pass. That portion of the top of the cone between the curved openings (when curved openings and curved wick-holders are employed) serves as a substitute for the ordinary button used with circular wicks; or a circular hole may be used in the cone, and the ordinary button employed. When flat wick-cases are employed, straight openings are made in the cone."

Reading that description alone, I should have thought that it related to one invention, but I am bound to state that the inventors, having said that, proceed to refer to two sets of drawings, and when you come to the two sets of drawings, you may roughly describe them in this way, that the one set of drawings refer to lamps with two separate wick-cases, the tops of which are not straight but curved, that is, the wick-cases curve inwards. They produce two flames of course, and these two flames pass through two holes or slots in the cone; they continue separate above the cone, although, of course, they might be raised higher, and unite at some place above the cone. The interior of the lamp-burners is supplied with air by an ingenious contrivance, though not a new one, through the wick-cases, and it is deflected upon the wick in a way which produces, as experience shews, a remarkably excellent light.

The other set of drawings describe a mere substitute for the old Argand burner—a different way of putting the wicks where flat

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wicks are used; and is no doubt an invention of little merit. The lamp does not appear to be in use, and it is of slight merit, and indeed it is a very trumpery matter. The lamp never appears to have been made, and the really useful invention is the first one.

Having, therefore, two lamp-burners of a substantially different sort, the inventors have naturally put in two claims, which I will call one for each. The material claim is the first. That claim is this: "We claim as our invention of improvements in lamps for burning paraffin oil and other volatile liquid hydrocarbons, firstly, constructing the burners of the said lamps substantially in the manner hereinbefore described, and illustrated in figures 1, 2, 3, 4, and 5 of the accompanying drawings, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames or elliptical or nearly circular flames." What does that mean? It means, as I read it, to tell the public what is the substance of the drawings, as if they had said, "We claim the burner constructed substantially in the manner hereinbefore described and illustrated in figures 1, 2, 3, 4, and 5 of the accompanying drawings." That appears to me to be the natural and proper reading of the words, and I so read them. I think that was the meaning of the inventors as ascertained from reading the specification, with the knowledge I now possess, dispossessing myself, so far as it is possible (I use those terms not unadvisedly) of some portion of the evidence which has come before me. I do not say it is impossible to put another construction upon the words, and that another construction may not be presented, and that, in another state of facts, it might not be possible for some other Judge to have adopted some other construction; but that, I think, is the fair and obvious meaning of the words of the claim.

The object and meaning of a claim is to put forth distinctly to the public notice—"That is my invention; you must not do this which I tell you is my invention; and when I tell you my lamp-burner is to be constructed substantially according to drawings, this is the substance of it, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat

wicks are placed so as to produce thereby two or more flat flames or elliptical or nearly circular flames." If that was the meaning of the claim, according to the scientific evidence adduced on the part of the Plaintiffs, without any more, that was not new. It was anticipated undoubtedly by *Halvorsen's* patent, if not by others. But it was certainly anticipated, and upon that there is no contest whatever. The real contest was this: it was alleged by the Plaintiffs that that was not the natural reading and meaning of the words—that the proper reading of the claim was this: "I claim not merely the employment in the burner of the two or more flat or curved wick-cases," and so on, "but I claim them as hereinbefore described or delineated in the drawings, or I claim them as hereinbefore described in combination with a cone with a double slot in it or two slots in it so as to produce thereby two flames." If that were the claim it would then raise another question, namely, whether the combination of the two wick-cases with the double-slotted cone was new or not? The scientific evidence of the Plaintiffs said it was new at the date of the specification, and there was no scientific evidence to the contrary. So that, so far as that is concerned, there was evidence that it was new. The opposition to that rested on a specification. The substantial opposition arose really from a patent of a Mr. *Little*, and the only material difference between the two patents which was pointed out was this, that one used a round wick and the other a flat wick. On the one hand it was said you can never support a patent by substituting a round wick for a flat wick, as there is no invention in that. On the other hand it was said, Why not? If it is a combination patent, the very essence of a combination patent is that it is a new combination of known parts, and in fact very few machines are now invented which contain any new part. As a general rule, every machine invented is made up of parts which are previously known. A new part of a machine is very uncommon indeed; consequently that is an objection which, *per se*, is not of great weight. But, like every combination which is new, it must have merit, and now how is a Judge to apportion the merit? I do not know. As far as I can ascertain from the authorities the merit very much depends on the result produced. Where a slight alteration in a combination

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turns that which was practically useless before into that which is very useful and very important, Judges have considered that, though the invention was small, yet the result was so great as fairly to be the subject of a patent; and, as far as a rough test goes, I know of no better.

Therefore, considering that *Little's* patent is said not to have been workable for any useful purpose, and this is not only workable, but has been worked to a great extent with a useful result, on this point my opinion is in favour of the Plaintiffs, that there is sufficient in the substitution of the flat wick for a solid round wick to support the patent.

That was the substance of the objection as regards novelty. Then a second point was taken on the second burner, which was a very small affair indeed, and that was this: The second burner was badly drawn; the drawing did not shew where the air was to get in. The thing itself may not be useful at all, and I am not sure that it is, but the utility objection not having been tried before me, I am bound to assume that it was. The reason why I am not sure, is that it never was put in practice. I cannot understand a practical lamp-maker not putting in practice a useful burner for so many years. That is my reason for doubting its utility, and I very strongly doubt it; but I am obliged, as a lawyer sitting here, to assume that it must have been sufficiently useful to come within the legal meaning of the term "useful" in patent law, which we know is very slight utility indeed. But even then it is a thing of very little merit; and then comes the question how far I am at liberty to correct the specification. The specification does not tell me where the opening is to let in the air. All it says is, "A circular hole is made in the cone or deflector, through which the circular flame passes." It is said that though there is no opening in the drawing, yet a workman could correct the drawing by putting in the opening, and he could correct it because he is told there is a cone or deflector, and the cone or deflector of the lamp means something or other which will deflect air, and therefore there must be sufficient air to be deflected and support the light and make it burn well. But, unfortunately for that argument, a lamp may burn badly although it is patented, and the patentee said it would burn badly, even

though the holes were exceedingly small, or, as I understand, if there were no holes at all it would burn, but it would be an imperfect combustion. Why is a workman to know *à priori* that every invention will answer? I cannot say that an inventor never made an invention which did not answer. On the contrary, I am quite sure that many inventors have patented inventions which did not answer at all; and we had a very striking instance in the course of this investigation, for several of the patented lamps were proved by the scientific and commercial evidence to be utterly useless, some because they were made on wrong principles altogether, and some because the makers did not understand what a lamp was wanted for at all, which is to give light.

Now, that being so, I am not prepared to say that, when you put your specification into the hands of a skilled workman, he is to exercise invention to make a lamp useful, that he is to correct it without being told anything to correct it by. This assumption was made, no doubt, by the very eminent scientific gentleman who gave evidence, Mr. *Bramwell*. Of course he could do it; he would know how to do it, and where to do it, and everything else. The other scientific gentleman could not deny that it was possible, but I take it that is not the meaning of the patent laws.

When you have such a little trumpery invention as the second, the whole merit of which is very small indeed, if you are to tell people how to do things better, you must tell them in a proper way, without the exercise of any invention or much trouble; and in my opinion this is not within the rule, and is badly specified. Though if I had been in the Plaintiffs' favour on the other part of the case, and, if I may say so, have done all I could by any fair construction to get over this, yet I again repeat that I think it is a blot on the patent, a blot which can be cured by disclaimer (and for that reason I have gone into the other part of the case), but still a blot on the patent which I think would require disclaimer to get rid of it. I am fortified in the view I take of the meaning of the claim in this specification by the conduct of the inventors themselves, Messrs. *James* and *Joseph Hinks*, and I am obliged to refer to it because it is conduct which must lead to my strong judicial reprobation. At the time they took out this patent, we have it in evidence from one of the

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two inventors that they were not aware that the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed, so as to produce thereby two or more flat flames, was not new. They thought it was new, and thought they had found it out. Of course if they had found it out, they would take out a patent so as to secure that novel and important invention. Like many other inventors, they were not aware of what had been invented and patented in this country; much less were they aware of what had been invented and patented in *America*, and published in this country. It appears to have been patented in a lamp which had not come into use, and the other lamp-makers had not heard of it, and it was invented and patented in *America* at an earlier date, and had been published in this country prior to 1865. It was *Halvorsen's* patent.

[His Lordship then stated the facts which led to the suit of *Rollins* v. *Hinks* (1) and the terms on which it was compromised, and, after commenting on the evidence in the present case, continued:—]

I am satisfied, independently of my construction of the specification, that Messrs. *Hinks*, or one of them, believed they had invented that which I consider to be their claim, and that they did intend to claim, as a matter of fact, that which they believed they had invented, and nothing else, and that the present attempt is a mere afterthought made to support the patent when they discovered, as they did discover on the view of *Halvorsen's* burner, and subsequently, that the other claim could not be supported. I regret to be compelled to come to such a conclusion. However anxious a Judge might be to support a patent in favour of justice and honesty, I do not think he should strain a point of construction in favour of what he considers impropriety and dishonesty; and if I were at liberty to have used this evidence for the purpose of construing the patent, I should certainly not have refrained from doing so. But I believe I am not at liberty to do so; therefore I have been compelled to construe the patent independently, so far as I could divest my mind of those circumstances; and coming to that conclusion, I am very well satisfied to find the view I have come to, and fairly come to, is to my mind proved conclusively to

(1) Law Rep. 13 Eq. 355.

be the view entertained by the patentees, though it may not bind in point of law the present Plaintiffs, and it may not be available in point of law as regards the construction of the specification.

It follows from what I have said that the judgment I ought to give on the issues of novelty and sufficiency of specification is one for the Defendants, and the bill will be dismissed with costs.

Solicitors for Plaintiffs: *Field, Roscoe, & Co.*, agents for *Barlow & Smith, Birmingham.*

Solicitor for Defendants: *C. H. Edmands.*

V.-C. M.
1876
Dec. 19.

In re SPEAKMAN.
UNSWORTH *v.* SPEAKMAN.

[1876 S. 381.]

Will—Construction—Gift to a Class—Death in Lifetime of Testator—Settlement of Share of Daughter.

A testator made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters.

A daughter having died in testator's lifetime leaving children who survived him:—

Held, that the gift of the daughter's share did not fail, and that her children were entitled.

Stewart v. *Jones* (1) questioned.

Statement.

DEMURRER.

John Speakman, by his will, dated the 16th of March, 1872, after appointing the Defendants his executors and trustees, and devising and bequeathing to them all his real and personal estate upon the usual trusts for sale and conversion, continued as follows:—

"I direct and declare that (subject to the charges thereon as herein mentioned) my said trustees shall stand possessed of my said trust estate and the moneys, proceeds, and income arising therefrom in trust for all my children (including *Lucy* and *Joseph*) who being a son or sons have attained or shall attain the age of twenty-one years, or being a daughter or daughters have attained that age or been married, or shall attain that age or be married, in equal shares, the share of each of my sons (other than my son *David*) to be for his own absolute use and benefit."

The will then contained certain provisions as to the share of

(1) 3 De G. & J. 532. 5 Jur. N. S. 229

David, comprising an ultimate gift for the benefit of the testator's other children which was to include any accruing share or shares under the trusts thereinafter declared, in case *David* died without having any child who should acquire a vested interest under the trusts of his share. And the will continued:—

"And as to the share of each of my daughters of and in my said trust estate, the same shall be held by my said trustees in trust to pay her the annual income thereof during her life for her separate use free from marital control, debts, and engagements, and without power of alienation or anticipation, and on her receipts alone; and after her decease in trust for her child if only one, or for all her children if more than one, who either before or after her decease shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, in equal shares; and in case any of my said daughters shall die without having any child who shall acquire a vested interest in their respective shares under this my will, then the share of each daughter, including any share or shares accruing under this present cross limitation, shall go to and be held in trust for such of my other children (including *Lucy* and *Joseph*) as being a son or sons have attained or shall attain the age of twenty-one years, or being a daughter or daughters have attained that age or been married, or shall attain that age or be married, in equal shares, the share of each son (other than my said son *David*) to be for his own use and benefit absolutely, and the share of my said son *David* and the share of each of my daughters to be held upon the same trusts and subject to the same directions and limitations over as are hereinbefore declared concerning his or her original share: Provided always, and I hereby declare, that if any son of mine shall die in my lifetime leaving a child or children, the child or children of the son or of each son so dying as aforesaid who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, shall take, and if more than one, equally amongst them, the share to which his, her, or their parent or respective parents would have been entitled of and in the said residuary trust estate and moneys if such parent had survived the testator and attained the age of twenty-one years, including any share or shares which would have accrued to such

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parent under the trusts and provisions in that behalf hereinbefore or hereinafter contained." The will then contained certain provisions relating exclusively to the interests of the testator's children *Lucy* and *Joseph*.

Statement.

The testator died on the 31st of March, 1873. One of his daughters, *Alice Unsworth*, who was married and living at the date of the will, predeceased him, having died on the 10th of August, 1872. She had at her death four children, three of whom were the Plaintiffs, the remaining one having died on the 24th of March, 1873.

The suit was instituted by these children for the administration of the estate of the testator, and by arrangement the demurrer was filed by the trustees of the will in order to raise the question whether, notwithstanding the death of Mrs. *Unsworth* in the lifetime of the testator, her children took the share designed for her.

Argument.

J. Pearson, Q.C., and *Grosvenor Woods*, in support of the demurrer:—

The question is whether, under the provisions of this will, the children of a daughter who died in the lifetime of the testator can take anything. The shares are given absolutely to the testator's children in the first instance as a class, and unless the effect of this gift is modified by the subsequent part of the will, the result would be that the children who survived the testator would take the whole, and the children of those who predeceased could take nothing. Then the subsequent clause merely settles the share which the daughter, if living, would have taken, and if by having predeceased the testator she took nothing the settlement of the share which she would have taken if living does not by itself confer any interest on her children: *Olney* v. *Bates* (1). This case is also covered by *Stewart* v. *Jones* (2).

Glasse, Q.C., and *Rigby*, for the Plaintiffs:—

The distinction between this case and *Stewart* v. *Jones* is that in that case the words were, "the share to which each of my daughters shall become entitled." Here the testator speaks of the share of his daughter. But the rule in *Stewart* v. *Jones* will

(1) 3 Drew. 319. (2) 3 De G. & J. 532.

V.-C. M. 1876 *In re* SPEAKMAN. UNSWORTH *v.* SPEAKMAN. Argument.

not be extended. It was disapproved of in *In re Potter's Trust* (1), the principle of which is quite applicable to the present case. The words here are equivalent to a substitution of the children of a daughter for herself in case of her death during his lifetime. That this is not a case in which the law as to gifts to a class is applied strictly, is pointed out in *In re Hotchkiss' Trusts* (2). The daughter does not really take an absolute interest, but, as in *Varley* v. *Winn* (3), the share is settled so as to give her a life interest only, with remainder to her children. It would be an unreasonable construction to make the remainder to the children dependent upon the time of the death of their mother being before or after that of the testator. Even where there is a clear gift to a class, the Court is not altogether precluded from including those members of the class who die between the date of the will and the death of the testator, but is at liberty to look at the general intention of the will, and put such a construction upon it as shall give effect to the intention rather than defeat it: *Habergham* v. *Ridehalgh* (4); *Walker* v. *Main* (5).

Pearson, in reply.

Judgment.

MALINS, V.C., after reading the parts of the will above set out, continued:—

The testator having given absolute interests to such of his sons as should attain twenty-one, and foreseeing the possibility of some of them dying in his lifetime leaving issue, says that the issue of the sons so dying are to take the share which the parent would have taken if living. But he makes no similar provision in the case of his daughters. And I think the reason of this difference is, that he was fully aware that by his will he had only given his daughters life interests with remainders to their children; and that the effect of the death of a daughter in his lifetime leaving a child would be simply to let the child into possession immediately instead of waiting till the death of her mother.

Now, with regard to the construction of wills, the view I take,

(1) Law Rep. 8 Eq. 52.
(2) Ibid. 643.
(3) 2 K. & J. 700.
(4) Law Rep. 9 Eq. 395.
(5) 1 Jac. & W. 1.

V.-C. M. 1876 — *In re* Speakman. — Unsworth *v.* Speakman. — Judgment.

a view which I have frequently expressed, is, that the first step is to be satisfied what the intention of the testator really was, and then see how far the words of the will carry that intention into effect. As regards the intention in this case, even Mr. *Pearson* does not say that there is any doubt. It is beyond question that the testator intended his daughters to be tenants for life only, and if he effected this the death of one of them in his lifetime would simply accelerate the interests of her children. The position of a daughter if she survived the testator would be simply that of a tenant for life.

It would be an extraordinary thing to say that the daughter was to be a tenant for life, with remainder to her children if she survived her father, and not if she did not survive. I am quite satisfied that this testator simply intended his daughter to be tenant for life of her share. It is true that it was called her share, and it was her share for the purposes of division, and of ascertaining into how many shares the property was to be divided. But the intention to give it to the children in all cases of her death is so clear to my mind as to be beyond all possibility of doubt.

Being, therefore, clear as to the intention, I think it is evident that there are words sufficient to carry the intention into effect. Mr. *Glasse* has drawn my attention to a passage in the judgment in *In re Potter's Trust* (1) bearing upon the decision in *Stewart* v. *Jones* (2), in which I made the following observations: "The only other case is *Stewart* v. *Jones*, where I am astonished to find that the present Lord Chancellor (then Vice-Chancellor *Wood*) held that the children of a parent who died between the date of the will and the testator's death were not entitled to take; on appeal, Lord *Chelmsford* affirmed the decision, stating that he entertained no doubt upon the case. There the language of the will was different from this; but that case appears to me to be so contrary to sound principle, that even if it had been precisely similar to the present I should have decided the other way, in order that it might have been reconsidered." That is the opinion which I then expressed, and which I adhere to now. The construction adopted in *Stewart* v. *Jones* was one which certainly defeated the intention of the testator and did the greatest injustice.

(1) Law Rep. 8 Eq. 60. (2) 3 De G. & J. 532.

V.-C. M.
1876
In re SPEAKMAN.
UNSWORTH *v.* SPEAKMAN.
Judgment.

On both grounds, therefore, my judgment is in favour of the Plaintiffs in the suit. I consider that the intention is perfectly clear, and that there are abundant words in the will to carry the testator's intention into effect. I agree entirely with the observations of Vice-Chancellor *James* in *Habergham* v. *Ridehalgh* (1) as to the principles which ought to guide the Court in the construction of wills, that is to say, they ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal, and common-sense spirit, to give effect to his manifest intention. On these grounds, therefore, I rest my decision, and the demurrer must be overruled.

Solicitors: *Field, Roscoe, & Co.; Milne, Riddle, & Mellor.*

In re COAL CONSUMERS ASSOCIATION.

V.-C. M.
1876
Dec. 16.

Winding-up—Landlord and Tenant—Right of Distress—Rent due at Date of Winding-up Order—Secured Creditors—Judicature Act, 1875, *s.* 10.

The 10th section of the *Judicature Act*, 1875, does not so far assimilate the rules in the winding-up of companies to the Rules in Bankruptcy as to give the landlord of property of which a company in liquidation are tenants a right to distrain for rent due before the winding-up order.

ADJOURNED SUMMONS.

Statement.

This was an application by Mr. *Hughes*, the ground landlord of a colliery of which a lease had been assigned to the *Coal Consumers Association, Limited*, now in course of winding up, for leave to issue a distress for one year's dead rent accrued to the 30th of June, 1876, and also for a sum of £6 13*s.* 10*d.* for surface rent.

The company was admitted to be in an insolvent condition, having assets to the value of £4000 only, consisting partly of mining machinery, which would be taken under the distress now applied for, and creditors secured to the amount of £40,000, and unsecured to the amount of £50,000.

The winding-up order was made on the 11th of February, 1876,

(1) Law Rep. 9 Eq. 395.

V.-C. M. 1876

In re COAL CONSUMERS ASSOCIATION.

Argument.

and the sum claimed was consequently made up of rent accrued partly before and partly after the winding-up.

Macnaghten, in support of the summons:—

There being no doubt as to the insolvency of this company, the only question is, how far the practice of the Chancery Division is affected by the provision in sect. 10 of the *Judicature Act*, 1875, that "in the winding-up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

There are two ways of regarding this provision. In the first place, it applies generally in the winding-up of companies the rules previously existing in bankruptcy as between secured and unsecured creditors, and in fact carries out the principle which the Court of Appeal in *Kellock's Case* (1) considered inapplicable to the case of the winding-up of companies. The right of distress is one of the points in which the practice in Chancery and in Bankruptcy differed. Under the *Bankruptcy Act*, 1869, s. 34, an express right of distress is given to landlords for one year's rent accrued due before the bankruptcy. Therefore, this right of distress being a security in the nature of a remedy belonging to one class of creditors only, is clearly one of the rules to which this provision applies, and now belongs to landlords in the winding-up of companies. It is an absolute right, not a matter of discretion with the Court. But, secondly, assuming that this section cannot be so applied, the *Judicature Act* was not necessary to give a landlord a right of distress against a company: *In re Exhall Coal Mining Company* (2). The difficulty previously has arisen from its having been held that the Court has a discretion as to the mode of dealing with a distress, and will so exercise the discretion as to put the landlord practically on no better footing than that of a simple creditor. Now the Court, enlightened by the *Judica-*

(1) Law Rep. 3 Ch. 769. (2) 4 D. J. & S. 377.

ture Act, will so exercise the discretion as to give the landlord the same benefit from his distress as in bankruptcy. The right of the landlord under the Rules in Chancery, as to so much of the rent as has accrued since the winding-up, is quite clear: *Ex parte Heaven* (1); and as regards the previous rent the former practice of the Court was based on the difference between the rules in winding-up and in bankruptcy, *In re Universal Disinfector Company* (2), which has now passed away.

Higgins, Q.C., and *Everitt*, for the official liquidator:—

Sect. 10 of the *Judicature Act*, 1875, does not meet this case. It is not a general enactment applying the Bankruptcy Acts to winding-up. It deals with certain special differences between the rules in Chancery and in Bankruptcy, and enacts that in those cases the rules in Bankruptcy shall prevail. As between secured and unsecured creditors the object was simply to deal with the rule laid down in *Kellock's Case* (3), and compel a secured creditor to realize his security and prove against an estate or in a winding-up for the balance only. The state of things under a bankruptcy is in general entirely different from that of a winding-up. The positions of secured and unsecured creditors are defined by sects. 16 and 40 of the *Bankruptcy Act*, 1869, and a right of distress is not a matter coming under that head. In fact, a landlord is not treated for the purpose of bankruptcy as a secured creditor at all. He has simply certain legal rights attaching to his position as landlord, and these are not touched by the provisions of sect. 10 of the *Judicature Act*, 1875. Then, as to the second point, the rule on which the Court acts is quite clear. In no case has the Court allowed a distress where the person seeking it could have proved for his debt in the winding-up. In *Ex parte Heaven* the landlord had no right to prove in the winding-up, and therefore he was allowed a right of distress, or rather execution; but this is not allowed in the absence of special circumstances giving such a right: *Ex parte North Staffordshire Railway Company* (4); *In re Progress Assurance Company* (5).

(1) Law Rep. 6 Ch. 462.
(2) Ibid. 20 Eq. 162.
(3) Law Rep. 3 Ch. 769.
(4) Ibid. 19 Eq. 60.
(5) Law Rep. 9 Eq. 370.

V.-C. M. 1876 *In re* Coal Consumers Association.

This rule applies even in the case of a statutory right of distress such as for rates: *In re West Hartlepool Iron Company* (1). The distinction between these cases and *In re Exhall Coal Mining Company* (2) is that in the latter case the company were not debtors to the landlord.

Macnaghten, in reply.

Judgment.

MALINS, V.C.:—

The point upon this summons is one of considerable importance, and turns upon the proper interpretation to be put upon sect. 10 of the *Judicature Act*, 1875. The facts are very simple. Mr. *Hughes* is the landlord of a coal mine, of which the company are in possession as assignees of a lease. There was some rent due at the date of the winding-up, and some has accrued since. So far as the question turns upon the winding-up of the company, it is settled by sects. 163 and 87 of the *Companies Act*, 1862. Sect. 163 makes every distress issued against the assets of a company, after the commencement of a winding-up, void to all intents and purposes. Under that section, therefore, a distress issued under such circumstances is absolutely void. But the language has been repeatedly held to be controlled by that of sect. 87, which provides that "when an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." Taking the two sections together, it is clear that no distress could be levied after a winding-up, except with the leave of the Court, but it would seem that with such leave it could be done. Now a distinction seems to have been drawn in the cases between the position of a landlord where he could and where he could not come in and prove in the winding-up of the company. And this distinction is applied as between rent due at the date of the winding-up and that which has accrued since. It appears very clear that when the official liquidator remains in possession after the winding-up has commenced for the convenience of the liquidation of the company, the landlord ought to

(1) 34 L. T. (N.S.) 568. WN (1876) (2) 4 D. J. & S. 377. 10 Jur. (N.S.) 134.

have some means of recovering the rent. I think a landlord might, under such circumstances, fairly say to the official liquidator that he must either pay a rent or go out of possession. It seems, therefore, to have been held that where the rent accrued after the winding-up, it must be assumed to have been for the convenience of the liquidation, and that, as against the official liquidator, the landlord had all the ordinary rights of a landlord against his tenant.

This being so, I have now to consider the effect of the 10th section of the *Judicature Act*, 1875. I am bound to say that to my mind the result of the decisions before that Act was very unreasonable, because whilst in Bankruptcy the rule was unquestioned, that where a creditor held security he was bound to realize or give credit for his security, and could only prove against the estate for the difference, according to the practice in Chancery the opposite rule prevailed. In *Kellock's Case* (1), treating a winding-up as equivalent to a bankruptcy, I held that the same rules ought to be applied in the case of a company as in that of an individual. Lord *Romilly* decided the other way, and the two cases came on to be heard on appeal together before the Lords Justices. That Court came to the conclusion that I was wrong, and that the rule in Bankruptcy did not apply in a winding-up; but I must say I always thought that the principle of my decision was sound.

However, all doubt is now removed by sect. 10 of the *Judicature Act*, 1875. [His Lordship then read that section, and continued:—] The result is that undoubtedly in a winding-up all parties must realize their securities and come in and prove for the deficiency merely. But the question here is, whether that section applies to a landlord's right of distress. I have been referred to sect. 16 of the *Bankruptcy Act*, 1869, sub-s. 5 of which defines what a secured creditor is. It states him to be a creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as a security for a debt due to him. It is quite clear that a landlord with a right of distress is not within this definition. Such a right is not a mortgage, charge, or lien; it is simply a right to resort to the chattels on the land in the occupation of the

(1) Law Rep. 3 Ch. 769.

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tenant. And until the landlord exercises that right he has no security whatever.

Then the point is, whether this 10th section is intended to do more than to apply in a winding-up the same rule as to secured creditors which obtains in bankruptcy. I confess it appears to me that the section applies to that object only. There are many privileges attaching to the office of trustee in bankruptcy. Amongst other things he may surrender and give up a lease, and so get rid of his liability. But the provisions of the Companies Acts relating to winding-up confer no similar privilege on the official liquidator. Yet, if the object of the provisions of the 10th section of the *Judicature Act* were to assimilate the law in all respects in the case of winding-up to that in bankruptcy, I should have to hold that it included the right of giving up a lease. It seems very reasonable that these provisions should also be applied to a winding-up; but the Legislature has not yet effected this object. Therefore, I cannot look upon this section as a provision for extending to a landlord in the case of a winding-up all the rights which he would have as against his tenants in a bankruptcy.

I desire to put a liberal construction upon an Act of Parliament when satisfied what was intended to be enacted. But I think this section does not apply to the case now before me. I therefore come to the conclusion that the section does not extend to give a landlord in the winding-up of a company that right which he would have had in the case of the bankruptcy of an individual to recover one year's arrear of rent by distress. He can only come in and prove under the winding-up.

With regard to the rent accrued since the winding-up order was made the case is not so clear. Therefore, as to this second point, if the parties cannot agree the case must be mentioned again. All I decide now is, that it does not apply to the case of a landlord distraining for arrears of rent due at the date of the winding-up. The applicant will have no costs. The costs of the liquidator will be out of the estate.

Solicitors: *Meredith, Roberts, & Mills; Harrison, Beal, & Harrison.*

WEST *v.* WHITE.

[1876 W. 226.]

V.-C. B.

1877

Jan. 25; *Feb.* 7.

Practice—Trial by Jury—Action in Respect of Nuisance—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26—*Rules of Court, Dec.* 1876, *Order* XXXVI., *r.* 29*a*—*Form of Issues.*

The Court will not, in the absence of special cause, by the exercise of the discretion given by Rules of Court, 1875, Order XXXVI., rule 26, deprive a Defendant in a nuisance case of his statutory right under Order XXXVI., rule 3, to have the question, or issues of fact, in the action tried by jury at the assizes for the county in which the works from which the alleged nuisance proceeds are situated.

And, having regard to such statutory right, it is a sufficient reason to be stated (as required by Rules of Court, December, 1876, Order XXXVI., rule 29a), on the order directing a trial at the assizes, and not in the Chancery Division, that the Defendant desires a trial by jury, and that the Court sees no reason to the contrary.

MOTION on behalf of the Defendants, that the issues of fact in this action might be tried before a Judge and special jury at the next spring assizes for *Kent* to be held at *Maidstone*.

The action was commenced in the Chancery Division in June, 1876, for the purpose of restraining, and obtaining damages in respect of, an alleged nuisance of smoke and vapours from the cement works of the Defendants *J. Bazley White & Co.*, at *Swanscombe*, near *Greenhithe*, in *Kent*. On the 20th of July, the Plaintiffs moved for an injunction, and the motion was then directed to stand over until the hearing. The evidence upon that motion was very voluminous, consisting of no less than 100 affidavits.

On the 28th of November the statement of defence was delivered, and on the 17th of January the Plaintiffs joined issue with the Defendants on the statement of defence, and on the same day gave notice of setting down the action for hearing with witnesses before the Vice-Chancellor for the 29th of January.

On the 20th of January (within the four days from the time of service of notice of trial, as provided by Order XXXVI., rule 3) the Defendants gave notice that they desired to have the issues of fact tried by a jury, and they now (January 25) moved accordingly.

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Argument.

Day, Q.C., and Sir *H. Jackson*, Q.C. (*Cozens-Hardy* with them), in support of the motion:—

The Defendants are entitled, as a matter of right, to have the issues of fact in this action tried before a jury: Rules of Court, 1875, Order XXXVI., rule 3. The action is a local action, and it is now settled that jury cases are not to be tried in the Chancery Division, but are to be tried in *London* or *Middlesex*, or sent to the assizes: *Warner* v. *Murdoch* (Court of Appeal, Jan. 12, 1877). It is most important in this case that there should be a jury with local knowledge and able to obtain a view of the premises, and therefore we ask that the action may be tried by a special jury at *Maidstone* assizes, as the most convenient and speedy mode of obtaining a decision upon the question at issue. The Plaintiff will rely on Rules of Court, 1875, Order XXXVI., rule 26, as giving the Court a discretion to direct trial without jury in causes "which previously to the passing of the Act could, without the consent of parties, be tried without a jury." That discretion was exercised in *Swindell* v. *Birmingham Syndicate* (1), but on the ground that the suit there would have been essentially a Chancery matter before the *Judicature Act*, and that in such cases the discretion remained. This case, however, does not fall under rule 26, as a nuisance action is not essentially a Chancery matter. Formerly, the Plaintiff would have been obliged to establish his right at law before obtaining an injunction. Then came *Lord Cairns' Act*, 1858 (21 & 22 Vict. c. 27), and *Rolt's Act*, 1862 (25 & 26 Vict. c. 42), enabling this Court to deal with these cases and decide legal questions, and try questions of fact. But the discretion of the Court to send issues to be tried by a jury, if it thought fit, was not interfered with. And, having regard to the *Common Law Procedure Act*, 1854, sect. 54, under which an injunction might have been obtained at law, such an action might just as well under the old procedure have been brought on the Common Law side. It is not, therefore, a case for the exercise of discretion under rule 26; and there is nothing to justify the Court in depriving the Defendant of the right plainly given by rule 3, and qualified only in a particular class of cases (of which this is not one) by rule 26.

(1) 3 Ch. D. 127.

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Kay, Q.C., and *Jason Smith*, for the Plaintiffs, opposed the motion:—

Argument.

The case falls exactly within rule 26, and the construction put upon that rule by *Swindell* v. *Birmingham Syndicate* (1). Being an injunction action brought in the Chancery Division, where these suits are of the commonest kind—a recent instance from the same locality being *Umfreville* v. *Johnson* (2)—it is one which, without the consent of parties, could (and as a matter of everyday practice and in the regular course would) be tried without a jury. The right of the Defendant in such cases to a jury was quite discretionary: *Bovill* v. *Goodier* (3); and the case falls exactly within Order XXXVI., rule 26, as a cause which, before the passing of the Judicature Acts, could, without any consent of parties, be tried without a jury. The right given by rule 3 is not absolute, but is expressly made subject to the discretion given by rule 26, and in order to construe these rules, they must both be read together. The case, therefore, is clearly one in which this Court has discretion to refuse the Defendants' application, and, further, it is a case for so doing, as a matter of convenience and in the interests of justice, as the matter will receive a more complete and satisfactory decision after a calm and patient hearing in this Court without a jury, than if sent down to take its chance in the hurry and scramble of the assize week at *Maidstone*. Having regard to the provisions of the Rules of December, 1876, Order XXXVI., rule 29a, no satisfactory reason "for which it is expedient that the action, question, or issue should be tried at the assizes, and should not be tried in the Chancery Division," can be stated on the face of the order (if made) as thereby required.

Judgment.

BACON, V.C.:—

I think I am bound by the Act of Parliament. This is a right which was given for the first time by this Act, and is applicable to such cases as the present. In plain terms it is that the Defendant may, upon giving notice within four days from the time of the service of notice of trial, or within such extended time as the

(1) 3 Ch. D. 127.
(2) Law Rep. 10 Ch. 580.
(3) Law Rep. 1 Eq. 35.

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Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried. That right, which the Act of Parliament so confers upon the Defendant, is subject to certain qualifications. It is controlled by the words "subject to the provisions of the following rules." Then the restriction is to be found in rule 26. [His Lordship referred to that rule]. That is merely a matter for the discretion of the Court, and the decision which has been referred to (*Swindell* v. *Birmingham Syndicate* (1)) establishes that the Court of Appeal will not interfere with that discretion when it is exercised. I am called upon to exercise that discretion now. I am asked on one side to give effect to that statutory title; and on the other to exercise a discretion, which I cannot do unless I decide that there are reasons which entitle me to deprive the Defendant of that statutory right which he has. Now, I am not aware that there is any such rule. There is no doubt that this case, before the Act of Parliament, might have been tried in this Court, and tried without a jury. But when the subject is considered, and the right of the Defendant is not lost sight of, I find the case justifies me in saying, in my discretion, that the Defendant should not be deprived of that right, and that the trial should not take place here against his will in this Court, when he desires, what the Act of Parliament seems to contemplate, that it should be tried before a jury. In my opinion it is only exercising a right which the statute gives, subject only to the counteracting effect of any discretion there may be. Indeed, there was on a recent occasion a case in which one of the Vice-Chancellors thought fit to say, in the exercise of his discretion under rule 26, that it was right the cause should be tried in this Court. I cannot say that here. Whether a view may or may not be absolutely necessary I cannot tell; but that it would be fatal to the interests of justice, as has been argued before me, I cannot for a moment entertain. I think the Defendant is entitled, in the very words of the statute, to have what he asks for. With respect to the reason which must be signified upon the order under Rules of Court, December, 1876, Order XXXVI., rule 29a, the reason is, that the Defendant, under Order XXXVI., rule 3, desires the trial by

(1) 3 Ch. D. 127.

jury, and I can find no reason why I should exercise discretion by refusing him a trial by jury.

Some discussion then took place as to the form of the order, of which the following is a minute:—

"On the application of the Defendants, and the Court seeing no good reason to the contrary, direct issues of fact to be tried at the next *Kent* Assizes before a special jury. Issues to be prepared and settled under Rules of Court, 1875, Order XXVI."

Feb. 7. The case was again mentioned upon the form of the issues.

Day, Q.C., and Sir *H. Jackson*, Q.C. (*Cozens-Hardy* with them), for the Defendants, asked that the following issue might be included in the issues as settled:—"Whether the business of the Defendants is conducted in a proper manner and in a place reasonably fit for the same."

The Defendants, whose right under Order XXXVI., rule 3, to have the issues of fact tried by a jury has been established, are entitled, as the parties putting the Court in motion, to have such issues as they considered relevant to their case determined by the verdict of a jury. Though it may be no longer possible after *Bamford* v. *Turnley* (1) to leave to the jury the question whether the spot was convenient and proper, and whether the burning of the bricks (the nuisance complained of) was, under the circumstances, a reasonable use by the Defendant of his own land, it has been laid down by the Exchequer Chamber in *Smith* v. *Fletcher* (2) that the opinion of the jury ought to be taken as to whether what was done by the Defendants was done by them in the ordinary reasonable and proper mode of conducting their business. The proposed issue was framed upon that decision.

Kay, Q.C., and *Jason Smith*, for the Plaintiff, were not called on.

BACON, V.C., refused to insert the proposed issue. What was complained of in this action was a nuisance from the works of the Defendants; and the reasonableness of the way in which those works were carried on had nothing to do with the question. *Smith*

(1) 3 B. & S. 66.

(2) Law Rep. 9 Ex. 64.

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v. *Fletcher* (1) was not a case of nuisance, but whether an overflow of water into the Plaintiff's mine was caused by a natural and unavoidable overflow, or by the way in which the Defendants had worked their mines. The proposed issue was too wide, too roving, and too speculative in its nature to deserve the name of an issue, and could not be directed.

MINUTE OF ORDER:—Upon motion, &c., the Defendants desiring to have the issues of fact in this action tried before a Judge and a jury, and the Court not deeming it desirable to direct a trial without a jury, and both sides desiring a special jury, Let the following questions of fact be tried at *Maidstone*, in the county of *Kent*, before a special jury of the said county of *Kent* at the next Spring Assizes:—

1. Whether the Defendants have carried on their works at *S.* in such a manner as to occasion a nuisance to the Plaintiffs?

2. Whether the new works of the Defendants, now in course of erection, will cause a nuisance to the Plaintiffs?

3. Whether the nuisance, if any, to the Plaintiffs, occasioned by the works of the Defendants, existed in the same degree twenty years ago, or has been materially increased during the last twenty years.

4. What, if any, damage has been occasioned to the Plaintiffs, or any of them, by the nuisances, if any, committed by the Defendants.

Solicitors: *W. Lane O'Neill; Wilson, Bristows, & Carpmael.*

V.-C. B. 1877 *Feb.* 8.

JONES *v.* HEAVENS.

[1877 J. 21.]

Injunction—Breach of Covenant not to carry on Trade—Liquidated Damages or Penalty.

A covenant—not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from *C.* under a penalty of £100, to be paid by way of liquidated damages for every such offence—is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in *C.*; and the breach will be restrained by injunction.

Statement.

MOTION for an injunction to restrain the Defendant from carrying on, or being concerned in carrying on, either directly or in-

(1) Law Rep. 9 Ex. 64.

directly, the business of a saddler and harness maker, and from selling any goods in any way connected with that trade within a distance of ten miles from the Town Hall of *Croydon*.

By a lease dated the 19th of May, 1874, the Defendant, *F. W. Heavens*, demised unto the Plaintiff a shop, No. 27, *High Street, Croydon*, for twenty-one years, at the yearly rent of £85. And the lessor (the Defendant) did thereby for himself, his executors, administrators, and assigns, covenant with the lessee (the Plaintiff), his executors, administrators, and assigns, "that he, the lessor, would not at any time during the said term carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler and harness maker, or sell any goods in any way connected with that trade, within a distance of ten miles from the Town Hall of *Croydon* aforesaid, under a penalty of £100, to be paid by him to the lessee, his executors, administrators, or assigns, by way of liquidated damages for every such offence."

In January, 1877, *Sands*, the Defendant's brother-in-law, set up in business as a saddlery and harness-making business at 92, *High Street, Croydon*, in the name of "*Sands*, Saddler." On the 31st of January Plaintiff's solicitor (Mr. *Smith*) entered the shop and asked a young man there for a leather strap. The young man shewed some straps, but *Smith* not being satisfied, the young man said he would call Mr. *Heavens*. *Heavens* (the Defendant) came down. *Smith* said he wanted a strap of a certain length. *Heavens* could not find one, but offered to cut one out. *Smith* chose another strap, for which he paid 2*s*., *Heavens* offering at first to send the young man out for change. *Smith* then asked *Heavens* if he was managing and carrying on the business, to which he replied "Yes," upon which *Smith* served him with a copy of the writ and notice of motion for an injunction.

According to the Defendant's version, however, his reply to *Smith's* question was that he was not carrying on the business, but was "merely working for Mr. *Sands* as a journeyman to get a living for my wife and family."

The Defendant, in his affidavit, stated that after the lease of 1874, he had set up in business at *Woolwich*, but was compelled in September, 1876, to file a liquidation petition, and had since been unable to get employment until January last, when his wife's

V.-C. B. 1877 JONES v. HEAVENS.

brother, *Sands*, commenced business as a saddler in *High Street, Croydon*, and offered to take him on as a journeyman. He stated that he had no interest in such business either directly or indirectly, nor any share in the profits, but was a mere journeyman receiving a weekly wage of 30*s.*, with apartments in the house for his wife and family.

Argument.

Tremlett, for the Plaintiff, in support of the motion.

Oswald, for the Defendant:—

1. The Court will not interfere by injunction where a sum certain has been agreed upon as the price for a breach of the covenant: *Woodward* v. *Gyles* (1); *Forbes* v. *Carney* (2); and the Defendant has in effect purchased the right to do the act: *Sainter* v. *Ferguson* (3); especially if the covenant has been actually broken (in which case the penalty must be paid) and the breach is not merely threatened or intended: *French* v. *Macale* (4). The Plaintiff's remedy is by action for recovery of the sum named as liquidated damages: *Chitty* on Contracts (5). In *Howard* v. *Woodward* (6) the nature of the agreement negatived the idea that the Defendant had purchased liberty to do the particular act.

2. Assuming that a breach of this covenant would not be satisfied by payment of the sum stipulated as liquidated damages, there has been no breach; as what the covenant prohibits is carrying on the particular business and selling as a principal, and it does not preclude the Defendant from being employed as a journeyman at fixed weekly wages by any other person carrying on the trade, or from selling in his shop: *Allen* v. *Taylor* (7).

[He also referred to *Newling* v. *Dobell* (8).]

[BACON, V.C., asked if the Defendant was ready to bring the £100 into Court.

Oswald was not instructed to assent to this.]

Judgment.

BACON, V.C., held that by acting as manager for another carrying on the particular trade the Defendant had brought himself

(1) 2 Vern. 119.
(2) Cited in Joyce on Injunctions, 80.
(3) 1 Mac. & G. 286.
(4) 2 D. & War. 269.
(5) 10th Ed. pp. 809, 810.
(6) 34 L. J. (Ch.) 47.
(7) 18 W. R. 888; 19 W. R. 35, 556.
(8) 19 L. T. (N.S.) 408.

within the terms of his covenant not to carry on, or be concerned in carrying on, either directly or indirectly, that particular business, or sell any goods in any way connected with that trade. There had been a very clear breach of the agreement by the Defendant, who was proved to have sold goods connected with the prohibited trade within the prescribed limits, and the Plaintiff was accordingly entitled to an injunction.

V.-C. B. 1877 JONES v. HEAVENS. Judgment.

Solicitors: *C. J. Smith; Hogan & Hughes.*

DAWSON *v.* BANK OF WHITEHAVEN.

V.-C. B. 1877 *Feb.* 16.

[1875 D. 133.]

Dower—Marriage before the Dower Act (3 & 4 *Will.* 4, *c.* 105)—*Mortgage of Husband's Freeholds, the Wife joining and acknowledging in order to release her Dower—Right of Widow to redeem—Principal and Surety.*

A wife, married before the *Dower Act*, who joined her husband in conveying, by deed acknowledged, his freeholds to a mortgagee free from dower, with a proviso for redemption in favour of the husband, and a power of sale directing the surplus to be paid to the husband:—

Held to be entitled, when a widow, to redeem her dower.

In the above circumstances, the widow, having been a surety for the husband, is entitled, upon payment or satisfaction of the first mortgage debt, to hold the property comprised in the first mortgage as a security for her dower against the subsequent incumbrancer.

Husband and wife, having been married before the *Dower Act*, joined in a deed, acknowledged by the wife, in mortgaging the husband's freeholds, free of dower, to secure a debt of the husband. The reconveyance on redemption and the surplus proceeds of sale were reserved to the husband alone. Afterwards, by deed executed by the husband alone, the lands were purported to be conveyed, subject to the first mortgage, free of dower, to a second mortgagee. Then by deed, to which the first and second mortgagees only were parties, the second mortgagee took a transfer to himself of the first mortgage debt and securities; and afterwards sold the property:—

Held, that the widow was entitled to dower out of the surplus proceeds of sale after payment of the expenses of sale, and of the first mortgage debt, interest, and costs.

Williams v. *Owen* (1) held irreconcilable with *Hopkinson* v. *Rolt* (2).

TRIAL OF CAUSE.

Statement.

The Plaintiff, *Elizabeth Dawson*, was the widow of *John Dawson*,

(1) 13 Sim. 597. (2) 9 H. L. C. 514.

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Statement.

whom she married in January, 1831. No settlement or agreement for a settlement was made before or after the marriage.

In December, 1846, *John Dawson*, being seised in fee of the manor of *Blennerhasset* and other hereditaments hereafter referred to as "the manorial property," and also of a freehold farm-house, lands, and hereditaments hereafter referred to as "the *Blennerhasset* estate," borrowed £8000, and by an indenture of mortgage dated the 24th of December, 1846, and made between *John Dawson* and the Plaintiff of the one part, and *Thomas Brocklebank* and others, mortgagees, of the other part, and duly acknowledged by the Plaintiff, in consideration of £8000 paid by the mortgagees to *John Dawson*, the *Blennerhasset* estate, and all the estate and interest therein of *John Dawson* and the Plaintiff, were expressed to be conveyed by *John Dawson* and the Plaintiff to and to the use of the mortgagees, their heirs and assigns, "freed, released, and discharged of and from all dower, and right and title to dower, of the said *Elizabeth Dawson* of, in, or out of the same hereditaments and premises," but subject nevertheless to the proviso for redemption thereinafter contained. The proviso for redemption provided that if repayment should be made with interest at £4 per cent. on the 24th of June, 1847, the premises should be reconveyed "to the said *John Dawson*, his heirs or assigns . . . or as he or they shall direct or appoint." The indenture contained a power of sale, and a proviso that the surplus proceeds of sale should be paid, after payment of expenses incident to the execution of the power, and of the mortgage debt and interest, "unto the said *John Dawson*, his heirs, executors, or assigns, or as he or they shall direct."

In 1854, and for some time previous, *John Dawson* was a customer of the Defendants, the *Bank of Whitehaven, Limited*, and by a deed dated the 3rd of November, 1854, and made between *John Dawson* of the one part, and *Gilfrid William Hartley* and another, trustees of the bank, of the other part, after reciting the mortgage deed of the 24th of December, 1846, and that there still remained due on the security of the same the sum of £8000, with the current half-year's interest thereon, and that the bank had an account current open with *John Dawson*, for the purpose of securing the repayment of any sums which might at

any time be owing to the bank from *John Dawson*, not exceeding £25,000, with lawful interest, the *Blennerhasset* estate and all the estate and interest of *John Dawson* therein were expressed to be conveyed, "freed and discharged of and from all right and title to dower of the said *Elizabeth Dawson* of, in, or out of the same hereditaments and premises," but subject to the said indenture of mortgage of the 24th of December, 1846, to and to the use of the trustees, their heirs and assigns; and it was provided that if *John Dawson* should, on demand, pay to the trustees all and every the sums and sum of money which might for the time being be due upon his current account with the bank, the trustees would reconvey "unto the said *John Dawson*, his heirs and assigns for ever, or otherwise as he or they shall direct or appoint." This indenture also contained a power of sale, and it was provided that the surplus proceeds of sale, after payment of expenses, of the debt and interest secured by the indenture of the 24th of December, 1846, and of the debt and interest intended to be secured by the present indenture, should be paid unto the said *John Dawson*, his heirs, executors, administrators, or assigns, or to such other person or persons as shall be equitably entitled thereto."

In 1858 the bank paid off the first mortgagees, and by a deed dated the 4th of December, 1858, and expressed to be made between the first mortgagees of the one part, and the trustees of the bank of the other part, the mortgage debt of £8000 and interest was transferred to the trustees of the bank, and the *Blennerhasset* estate was conveyed to the same trustees, their heirs and assigns, "subject to such right or equity of redemption as the same premises are now subject to under or by virtue of the hereinbefore recited indenture" (namely, the indenture of the 24th of December, 1846), on payment to the trustees of the sum of £8000 and interest.

In October, 1860, default having been made in payment of the moneys intended to be secured by the above indenture, the bank trustees sold the manorial property and also the *Blennerhasset* estate by public auction for £16,200. The purchaser settled with the Plaintiff as to her dower on the manorial property, and as to that no question arose; but with regard to the *Blennerhasset* estate, the purchaser was not bound by the conditions of sale to

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pay, and did not pay, to the Plaintiff anything in respect of her right of dower, if any.

On the 24th of November, 1874, *John Dawson* died.

On the 14th of October, 1875, the Plaintiff filed this bill, alleging that she executed the indenture of the 24th of December, 1846, "only for the purpose of facilitating such mortgage and enabling the said *John Dawson* to obtain the advance of the said sum of £8000, and not for the purpose of conferring any further benefit on the said *John Dawson*, or of releasing her right to dower out of the said mortgaged hereditaments and premises further than was necessary for securing the said principal sum and interest and expenses;" and contending that she was entitled to have assigned and secured to her her dower or the equivalent for the same out of so much of the £16,200 as arose from the sale of the *Blennerhasset* estate, after deducting what was due to the Defendants for principal, interest, and costs, under the indenture of mortgage of the 24th of December, 1846; and, further, that "under the circumstances, she is entitled, upon the principle of exoneration from the debts of the said *John Dawson*, to have a proper proportion of the said purchase-moneys applied towards making good to her the dower to which, but for her exoneration and acknowledgment as aforesaid of the said indenture of mortgage of the 24th day of December, 1846, she would be entitled out of so much of the *Blennerhasset* estate as is represented by the principal money and interest and costs which at the time of the said sale were due upon the security of the last-mentioned indenture."

The bill prayed, amongst other things, for declarations in terms corresponding to the above contentions.

The Defendants, by their answer, said that, "if the Plaintiff's purpose in executing and acknowledging the said indenture was only the purpose alleged by her in her said bill, and no other purpose, the Defendants were not aware of any such limited purpose, and had no reason to conceive that the said indenture was intended to have any other effect than the natural and legal effect thereof, which the Defendants submit was to wholly and absolutely release the said *Blennerhasset* estate generally of and from all right whatsoever of the Plaintiff in respect of her

alleged claim to dower therein, and particularly in the event of the sale thereof."

Statement.

They met the contentions of the bill thus: On the several following grounds they denied that the Plaintiff, upon *John Dawson's* death, became entitled to dower: 1. Under the deed of the 24th of December, 1846, it is plain that the Plaintiff thereby voluntarily divested out of her husband the legal estate in the *Blennerhasset* estate, and that after the execution and acknowledgment of the deed there remained in her husband only an equitable estate, viz., the equity of redemption, which was reserved to him, his heirs and assigns, and not to him and her jointly, or to her severally, and this equitable estate was not subject to dower. 2. The deed contained a power of sale, with a direction that the surplus proceeds should be paid to *John Dawson*, or as he should direct. 3. The second mortgage contained a like provision. 4. The Defendants accepted their security "upon the faith of the contents and effect of" the deed of the 24th of December, 1846; and it was upon the like faith that they "abstained from making or seeking to make" the Plaintiff a party to their mortgage deed. 5. The Defendants sold under the powers in the two deeds, and applied the proceeds as authorized by the deeds. 6. The hereditaments were sold and converted in *John Dawson's* lifetime with the consent and concurrence of the Plaintiff given by her in the deed of the 24th of December, 1846. 7. The proceeds of sale were insufficient, after payment of costs of sale, and the £8000, interest, and costs, to discharge the Defendants' debt, and there was no surplus. 8. The Plaintiff's right to dower, if any, would be subsequent in date to the Defendants' rights. At the most, the Plaintiff would be (but the Defendants did not admit that she was) a surety for her husband in respect of the £8000 and interest; but even as such she would have no claim for contribution against the purchase-money in the hands of the Defendants.

Argument.

Kay, Q.C., and *Dryden*, for the Plaintiff:—

The Plaintiff having been married before the 1st of January, 1834, her dower is, by sect. 14 of the *Dower Act* (3 & 4 Will. 4, c. 105), which was passed in August, 1833, excluded from the operation of that Act.

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We make no claim against the purchaser, and he is not a party. But, against the second mortgagee, who has got in the first mortgage, and has since sold the property, and holds the purchase-money, we claim to be entitled to dower on two grounds—one, that a wife joining her husband for the purpose of enabling him to mortgage his freeholds free of her dower, joins for the limited purpose of the mortgage only, and that when that purpose is fulfilled, is free to claim her right as before. Secondly, that a wife so joining, joins as surety for her husband's debt, and that upon the payment of the debt she is entitled as against the estate of the principal to the benefit of all the securities which the creditor held.

On the first point, we rely on *Earl of Huntingdon* v. *Countess of Huntingdon* (1), fully stated in *Tudor's* Leading Cases in Equity (2); where other authorities are collected; and on the remarks in *Tudor's* Leading Cases in Conveyancing (3), referring to *Dolin* v. *Coltman* (4); *Lampet's Case* (5); *Anon.* (6); *Jackson* v. *Parker* (7). The doctrine is treated by Lord *Redesdale*, in the course of his judgment in *Jackson* v. *Innes* (8), as established (9).

On the second point, that of suretyship, we rely on *Parteriche* v. *Powlet* (10); *Drew* v. *Lockett* (11).

Where an estate is mortgaged, the equity of redemption remains subject to the old uses: *Wood* v. *Wood* (12), whatever the form of the proviso for redemption or the power of sale. Where a husband executes a mortgage of his wife's chattels and dies, this is not a reduction of the chattels into the husband's possession, and the surviving wife has the right to redeem: *Clark* v. *Burgh* (13).

A. Brown (Sir *H. Jackson*, Q.C. with him), for the Defendants:—

The case is not governed by authority; there is no recorded decision precisely in point.

In this case, there was by the first mortgage deed a complete extinguishment of the wife's right to dower—not merely against

(1) 2 Bro. P. C. 1.
(2) Vol. ii. p. 1011.
(3) Page 65.
(4) 1 Vern. 294.
(5) Co. Rep. 10, 46 a.
(6) 2 Eq. C. Ab. 385.
(7) Amb. 687.
(8) 1 Bli. 104.
(9) Ibid. 126.
(10) 2 Atk. 383, 384.
(11) 32 Beav. 499.
(12) 7 Beav. 183.
(13) 2 Coll. 221.

the purchaser (which is admitted), but against the husband's estate. In other words, the Plaintiff, the widow, has no right to redeem in respect of her dower. The argument must be put as high as that. It is laid down in *Fisher* on Mortgages (1), that widows who have been married before the *Dower Act* cannot "redeem mortgages made subsequent to their marriage when they have barred their dower;" the reference being to *Powell* on Mortgages (2).

Here the right to redeem was not reserved to the husband and wife jointly, as in *Jackson* v. *Parker* (3), and that authority does not apply. In *Dolin* v. *Coltman* (4), the husband expressly agreed that the wife should have the redemption. In short, there is no authority on the point in any of the English books; but the question seems to have been decided against the widow in an American case of *Manhattan Company* v. *Evertson* (5), as stated in *Abbott's New York* Digest (6). The learned Vice-Chancellor *Ruggles*, in delivering judgment in that case, relied upon *Banks* v. *Sutton* (7), *Chaplin* v. *Chaplin* (8), and *Cru.* Dig. (9); and these authorities are declaratory of the law of this Court. In that case, no doubt, the deeds executed by the husband and wife were fraudulent, but the Vice-Chancellor said (10): "If it is otherwise, and all the beneficial interest of the grantors, after the performance of the specified trusts, resulted or reverted to" the husband "as contended by counsel, still" the wife "is not entitled to dower in that trust estate."

The case was appealed; and the Chancellor of the State of *New York* (*R. H. Walworth*), in giving judgment, said: "Whether the conveyances from *G. B. Evertson* and wife to *J. R. Evertson* were absolutely void as against the creditors of the grantors, or operated as a valid transfer of the legal title, subject to a resulting trust in *G. B. Evertson* for the surplus, after paying the mortgage to the complainants, the Vice-Chancellor was right in supposing the

(1) 3rd Ed. vol. ii. p. 760, pl. 1232.
(2) Page 286, note (S). But see Powell on Mortgages, 677, 678, note (D).
(3) Amb. 687.
(4) 1 Vern. 294.
(5) 6 Paige's Ch. Rep. 457.
(6) Vol. ii. p. 741.
(7) 2 P. Wms. 700.
(8) 3 Ibid. 229.
(9) Vol. i. p. 488 (410?).
(10) 6 Paige, 460.

(1) 2nd Ed. p. 307. pl. 533.

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widow was not entitled to dower in the surplus. In either case, as between the grantors and grantee, the legal title passed to the latter, and previous to the revised statutes, the widow could not be endowed of a mere equity" (1).

The subject is discussed in *Jarman's Bythewood's* Conveyancing (2), where the learned writer maintains, against an array of opinions which he cites at length, treating Sir *T. Sewell's* remarks in *Jackson* v. *Parker* (3) and those of Lord *Redesdale* in *Jackson* v. *Innes* (4) as extra-judicial, that by a fine levied by husband and wife, the wife's right to redeem is absolutely barred and extinguished as much in equity as it undoubtedly is in law—the estate not originally having been hers, but the husband's—and quotes written opinions of Mr. *Hayes* and Mr. *Bell* to the like effect. The grounds of these opinions were two. First, it was said that, during the husband's lifetime, dower is not an estate but a right, and that "there can be no resulting use upon a conveyance operating as the release of a right, and not as the transfer of an estate": *Sanders* on Uses (5). Secondly, it was said that dower could flow only out of the seisin of the husband, which was gone at law; and that after the fine he had merely an equitable estate, out of which a widow before the statute was not dowable.

The Defendants' rights are not affected in any way by their notice of the first mortgage. They took the second mortgage from the husband alone, not requiring any conveyance from the wife, on the faith that the dower was effectually barred.

If the first ground of the claim should be decided in favour of the Plaintiff, it is admitted that the Defendants cannot succeed upon the second. There is a decision in *Bowker* v. *Bull* (6) which seems to make against the Defendants; but in *Williams* v. *Owen* (7), where a mortgage debt was further secured by the covenant of a surety for the mortgagor, and the mortgagee made a further advance, and then recovered the first mortgage debt from the surety, it was held that the surety must pay the amount of the further advance before be could get an assignment of the property

(1) 6 Paige, 465.
(2) 2nd Ed. vol. iv. p. 173.
(3) Amb. 687.
(4) 1 Bli. 106.
(5) 5th Ed. vol. i. p. 226; referring to 13 Rep. 55; 22 Vin. Abr. 209 (O. 3.)
(6) 1 Sim. (N.S.) 29.
(7) 13 Sim. 597.

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to him; and in *Farebrother* v. *Wodehouse* (1) the Master of the Rolls, Lord *Romilly*, said he did not think Lord *Cranworth*, in *Bowker* v. *Bull* (2), intended to overrule the decision in *Williams* v. *Owen* (3). The result is, that the Defendants in this case are entitled to tack their second advance, and to retain the securities for it against the surety, until the second debt is paid.

Argument.

Kay, in reply:—

In the note by Mr. *Jarman* which has been read, several authorities are cited which oppose the position contended for by the writer, namely, that a wife who joins in conveying her husband's freeholds for the purpose of a mortgage only, cannot redeem; and amongst these opposing authorities are those of Sir *T. Sewell* in *Jackson* v. *Parker* (4), and of Lord *Redesdale* in *Jackson* v. *Innes* (5). No one can read these authorities without perceiving that a recognition of the wife's right in equity to redeem is involved in each of them. Nor does Mr. *Fisher* (*Fisher* on Mortgages (6)) say expressly that the wife has no right to redeem. The American case was one of absolute fraud.

If the first point be decided against the Plaintiff, the second is too clear for argument. The widow joins for the purpose of giving up her right so far as the mortgagee is concerned, but no further. From that moment, she puts herself in the position of a surety. It is a question whether *Williams* v. *Owen* can stand as an authority after the decision in *Hopkinson* v. *Rolt* (7). In *Williams* v. *Owen* both the first and the second advances were made by the same person.

BACON, V.C.:—

Judgment.

Although the question in this case is a nice one in some respects, yet it becomes very plain when it is considered that it must rest upon principles of law which are perfectly established.

In the face of the authorities, there can, I conceive, be no doubt that a wife who joins her husband in making a mortgage for a specified purpose, to secure the sum mentioned in the mortgage

(1) 23 Beav. 18, 29.
(2) 1 Sim. (N.S.) 29.
(3) 13 Sim. 597.
(4) Amb. 687.
(5) 1 Bli. 123.
(6) 3rd Ed. vol. ii. p. 760, pl. 1232.
(7) 9 H. L. C. 514.

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deed, does not (although in form she releases her right to dower) within the meaning and operation of that deed release any more than is necessary to satisfy that mortgage, and that all beyond belongs to her—I mean all beyond of her right to dower. That is covered by authority. The decision of Sir *Thomas Sewell* at the Rolls, and the doctrine laid down by Lord *Redesdale* in *Jackson* v. *Innes* (1), on which the decision of the House of Lords proceeded, have entirely established the principle. Then it is said that I must listen to the American case, which has been cited as an authority for the purpose. I have not had an opportunity of reading the American case. I should not, of course, adopt it as a binding authority upon me under any circumstances, but I should very thankfully receive any information it could convey to me, and I should without scruple follow it if I thought it was directly applicable and right in itself. But when, upon the very face of it, the transaction out of which the claim arises is a fraudulent conveyance by the husband and wife, to defeat the husband's creditors, to a trustee, upon trusts, no one of which entitles the wife to redeem—when I find that that is a great feature in the case, and must have influenced the judgment—the deed being set aside against the creditors, but said to be good as between the husband and the wife and the trustee, and containing no power to redeem, but having a directly contrary operation, I cannot conceive that that case has any application to the question raised before me here.

What I have to deal with here is a plain principle of equitable law; and I find, as I have said, that the authorities do establish it as a plain principle, that, subject to the payment of the mortgage debt, for which purpose, and for which purpose alone, the wife joins in the conveyance, she, that purpose being answered, is entitled just as she was before. If the husband had exercised the power of redemption, his estate would have been the same as it was before, and his wife would have been dowable under it.

Then, considering it upon principle, and not disregarding the cases which have been referred to, can anything be more plain or more just in itself than that the wife, who lends her dower (for that is exactly what she does), and pledges it for her husband's debt, is entitled to all that remains after that purpose is satisfied?

(1) 1 Bli. 104.

It is said there is no case on the subject. I am not at all surprised that there is no case on the subject; but there is decision enough. It is not surprising that no such case should ever have been raised. Upon the first point, therefore, I entertain no kind of doubt that the wife had, notwithstanding the terms of the proviso for redemption, a right to redeem, and that the extent of the security which she gave was not greater than the sum which it was proposed to secure by the mortgage. But, beyond that, her right remains as if no mortgage deed had ever been executed, and her husband could not have deprived her of it under the terms of the proviso for redemption. By no legal means could she be deprived of that which she had not, in the view of a Court of Equity, parted with entirely, even if she had at law released her dower. Nothing could deprive her of that which belonged to her, and resulted to her, as soon as the limited purpose for which she surrendered her right to dower had been satisfied.

There is no case that conflicts with this. *Williams* v. *Owen* (1), which is a case about which I desire to say as little as may be, has a very remote application to this case, if it has any. It would, in my opinion, as I read it at present, be at variance entirely with the principle of *Hopkinson* v. *Rolt* (2). In that case a mortgagee had advanced a sum of money, and had consented to advance more, and, although another mortgage had been created in the meantime, he made a further advance, with notice of the second mortgage, and nevertheless claimed priority. It was held that he was not so entitled, because he had had full notice of what was done. Notice is not wanting in this case; because there is a passage in the answer, which contains in most explicit terms the assertion on the part of the Defendants that, when they took their mortgage of 1854, they knew that the wife would not be a party, they did not choose to ask her to be a party, and they chose to run the risk, knowing all the circumstances, and knowing, as I am bound to say they must have known, because they ought to have known, that she had a right to redeem, and that the pledge made by her was of a limited nature. I should find it difficult, if it were necessary, to reconcile *Williams* v. *Owen* with that universal principle in the law of suretyship, that the

(1) 13 Sim. 597. (2) 9 H. L. C. 514.

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surety is entitled to the benefit of any security which the secured creditor may hold. It is true that the surety there had not been a party to the transaction. I cannot conceive that that makes any difference if the law be, as I take it to be, that a surety is entitled to the benefit of any security held by the mortgagee in the transaction in respect of which the surety incurs an obligation. It is not necessary to pursue that further, because the other case mentioned, besides those at the Rolls—I mean the case of *Bowker* v. *Bull* (1), before Lord *Cranworth*—carries it still further; and the right contended for here is, in my opinion, indisputable.

Then, finding the decisions to be such as they plainly are, that the wife has a right to redeem, and finding the fact unquestionably to be that she joined in the security which is proved in evidence, only for the limited purpose of securing the sum mentioned in the first mortgage deed, I consider that the second mortgagee who paid off that mortgage can have no other right than the husband would have had if he had redeemed, and that the subsequent security could not affect that right which by this suit she asserts, namely, to get the value of her dower established, against the Defendants, who have sold and received the price for the whole of the estate, including, as it did, the limited interest which by the deed she had consented to charge.

In my opinion the bill is perfectly right. The relief sought by it cannot be resisted, and the decree must be made to that effect in the Plaintiff's favour.

The following are minutes of the order:—

Inquiry as to value of dower of widow in the *Blennerhasset* estate.

Inquiry what proportion of surplus purchase-money beyond the £8000 and interest was proceeds of or to be treated as proceeds of the *Blennerhasset* estate.

Inquire whether widow has received from the purchaser any compensation for dower in respect of any part of the *Blennerhasset* estate.

Order Defendant to pay value of dower out of such part of surplus.

Order Defendant to pay costs of suit.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Atkinson, Collins, & Atkinson, Whitehaven; Johnston & Harrison*, agents for *Postlethwaite & Brown, Whitehaven.*

(1) 1 Sim. (N.S.) 29.

CHANDLER *v.* HOWELL.

V.-C. H.
1876
Nov. 11.

[1875 C. 300.]

Mortmain Act—Public Body—Improvement Commissioners, Mortgage by—Works, Rents, and Rates—Charity—Interest in Land.

The Act for improving the town of *Aberystwith*, and supplying the inhabitants thereof with water, vested in the commissioners thereunder the works and the soil thereof, and authorized them to purchase land, to construct and carry on waterworks and gasworks, and to make rates upon occupiers of lands, and recover them by distress.

Mortgages by the commissioners whereby, under the borrowing powers conferred by the Act, they granted and assigned the "works, rents, and rates," authorized by the Act, to the lender until the sum borrowed should be repaid:—

Held, to confer upon the lender an interest in land within the *Statute of Mortmain*.

Holdsworth v. *Davenport* (1) distinguished.

Statement.

THE Act 5 & 6 Will. 4, c. 46, "for improving and regulating the town of *Aberystwith*, and supplying the inhabitants thereof with water," by sect. 25, vested in the commissioners thereunder (now represented by the corporation) the squares, roads, streets, and carriage and footways within the town, and the ground and soil thereof, with the pavements and drains, and all buildings and works to be made or provided by virtue of the Act; and by sects. 26 and 27, empowered the commissioners to construct and carry on gasworks and waterworks for the supply of the town. The Act also empowered the commissioners to charge gas and water rents, and to let such rents for three years to any person willing to farm the same (who was to have the same powers for enforcing the rents as the Act vested in the commissioners); to remove obstructions and projections from buildings, to set back the line of houses taken down to be rebuilt; and gave them other powers for the paving, lighting, watching, repairing, widening, and otherwise improving the town. By the 116th section, the commissioners were empowered to purchase lands by agreement for the purposes of the Act; by sect. 137, to re-sell such part thereof

(1) 3 Ch. D. 185.

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as should not be wanted; and by sect. 139, it was enacted that in all assurances to be made by them the words "grant and convey," or "grant and assign," should operate as covenants for title. The commissioners were then empowered, by sect. 140, to make rates for the purposes of the Act, and to recover them by distress, and by sect. 150, they were empowered, "from time to time, when they shall judge necessary for the purpose of carrying this Act into execution, to borrow and take up at interest any sum or sums of money not exceeding in the whole the sum of £12,000, and by any writing under the hands and seal of any five, or more of them, to mortgage, demise, grant, or assign over the works, rents, and rates, to be erected, reserved, and made under this Act, or any part or parts thereof, to the person or persons who shall advance or lend such money . . . . as a security or securities for the money so to be borrowed, with interest for the same . . . . and every such mortgage may be in the words, or to the effect, following":—

"By virtue of" (the Act), "we, the undersigned, being of the commissioners, acting in execution of the said Act, in consideration of the sum of - pounds, advanced and lent by to the said commissioners, upon the credit of the works, rents, and rates authorized to be erected, reserved, made, and collected by the said Act, do hereby grant and assign unto the said , his executors, administrators, and assigns, such proportion of the said works, rents, and rates as the said sum of £ doth or shall bear to the whole sum borrowed, or to be borrowed or charged upon the credit of the same works, rents, or rates, to be had and holden from the day of the date of these presents until the said sum of £ , with interest for the same" (after the rate specified), "shall be fully repaid and satisfied. In witness," &c.

The late Mrs. *Anne Pughe*, in June, 1865, lent to the corporation of *Aberystwith*, under the provisions of this Act, the sum of £400 upon the security of a mortgage of the works, rents, and rates authorized by the Act in the form given above; and she died in 1874, having, by her will, devised and bequeathed her residuary real and personal estate upon trust, to divide the same between two charities. A suit having been instituted to carry into execution the trusts of this will, the question arose, and

was now argued upon further consideration, whether the £400 secured by this mortgage was pure personalty and available for the charitable bequest, or was an interest in land within sect. 3 of the *Statute of Mortmain*.

Argument.

Dickinson, Q.C., and *T. A. Roberts*, for the Plaintiffs, who were the treasurers and trustees of the *National Hospital for the Relief and Cure of the Paralysed and Epileptic* (one of the two charities interested):—

This mortgage is pure personalty, and not within the *Statute of Mortmain*. The mortgage is in form only an assignment of a proportion of the "works, rents, and rates" authorized by the Act, which gives to the mortgagee no interest in, or right of entry upon, any land which may be vested in the commissioners, but only a right to the rates when collected, and in the shape of moneys in the hands of the commissioners. There is no distinction between a mortgage in this form and a mortgage by a public company of their undertaking. In *Holdsworth* v. *Davenport* (1) Vice-Chancellor *Malins* decided that a mortgage by a waterworks company of their undertaking, and the rents, rates, and sums of money arising under their Acts, was not within the statute. In *Gardner* v. *London, Chatham, and Dover Railway Company* (2), where the mortgage was of the general undertaking of a railway company, and "all the tolls and sums of money arising" out of the general undertaking, the nature of these mortgages or debentures was explained; and it was held that the mortgagee could not break up the "undertaking," which was the living going concern, nor seize the lands which were part of it, but was only entitled to its earnings. Any real estate which is vested in the commissioners under this Act is so vested simply to enable them to carry out the purposes of the Act, and to perform the duties thereby imposed upon them, *i.e.*, to supply the town with water and gas; and not for the purpose of enjoyment in the ordinary character of owners of real estate. And that which they can mortgage is what they get for supplying the water and gas, *i.e.*, the rates, and it cannot be that persons who lend to them moneys to enable these supplies to be continued can enter upon or take away

(1) 3 Ch. D. 185. (2) Law Rep. 2 Ch. 201.

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the lands so held; for by this means they would bring about the stoppage of the works, the very result the loan itself was intended to prevent. Then, on principle, real property purchased for the purpose of carrying on a business is not within the statute. It was not at interests of this nature that the Legislature intended to strike in passing the *Mortmain Act*, and the tendency of modern decisions is to restrict the application of that Act: *Myers* v. *Perigal* (1).

HALL, V.C., then called upon the counsel for the Defendant.

Morgan, Q.C., and *Elphinstone*, for the Defendant, who was the trustee and executor of the testatrix, and also one of the residuary legatees:—

There is a clear distinction between the present case and those cited on behalf of the Plaintiffs. This is not a mortgage by a public company of its undertaking, as in *Holdsworth* v. *Davenport* (2) and *Gardner* v. *London, Chatham, and Dover Railway Company* (3), nor a bequest of shares in a joint stock bank, part of whose assets consisted of lands, as in *Myers* v. *Perigal*. Joint stock companies are nothing more than partnerships, and the reasoning of Vice-Chancellor *Malins*, in *Holdsworth* v. *Davenport*, is that debentures of joint stock companies, which are an assignment of shares, are no more within the *Mortmain Act* than the shares themselves; His Lordship's direct *ratio decidendi* was, however, the decision in *Gardner* v. *London, Chatham, and Dover Railway Company*. Now here, not only the works, but the soil of the ground on which they stand, is vested in the commissioners in fee simple, with an absolute power to sell what they do not want; and our mortgage is a grant of the "works," the fee simple of which is so vested in the grantors, the "rents," which are the annual profits derived from the letting of the works, and the "rates," which are levied upon the occupiers "of all messuages, tenements, and hereditaments within" the town, and which are recoverable by distress. Can it be said that this is not an interest in or a charge or incumbrance affecting lands, tenements, or hereditaments within the

(1) 2 D. M. & G. 599, 619. 17 Jur 145 (2) 3 Ch. D. 185.
(3) Law Rep. 2 Ch. 201.

3rd section of the *Mortmain Act?* In *Finch* v. *Squire* (1) it was decided by Sir *W. Grant* that moneys lent upon the security of poor-rates and county-rates were within the statute, and that there was no distinction in that respect between such a security and a security upon turnpike tolls. So likewise in *Howse* v. *Chapman* (2), bonds granted by the commissioners for the improvement of the city of *Bath* were held to be within the statute.

The exact point, however, came before Vice-Chancellor *Wood*, in *Thornton* v. *Kempson* (3), where moneys secured by an assignment by way of mortgage, from the commissioners for paving, lighting, watching, cleansing, and otherwise improving (the same purposes as in the present Act) the town of *Birmingham*, of the town hall rates, were held to be affected by the statute. The present case, however, is stronger, for the mortgage here comprises the works, and so the land itself as well as the rates. As Vice-Chancellor *Wood* said, in *Thornton* v. *Kempson*, the commissioners have assigned the power of collecting the rates, and the mortgagee is entitled not only to the money raised, but to have the powers of the commissioners for raising it put in force, either by a mandamus at law or a receiver in equity. That is the right of the mortgagee here, and this distinguishes the case from the mortgages of trading companies in the nature of partnerships, whose holding of land is only incidental to their trade, as in the cases of *Gardner* v. *London, Chatham, and Dover Railway Company* (4) and *Holdsworth* v. *Davenport* (5), for there the mortgagee has no such right. The very form of the mortgage given by such a company is different. It is a mortgage of the undertaking, not of the soil of the railway, but of something which is got by the user of it.

Kekewich, for the *Brompton Hospital*, the other of the two charities interested.

Dickinson, in reply:—

The real question is, whether these mortgages were to confer on the mortgagee an interest in the tree or in the fruit, and according to *Gardner* v. *London, Chatham, and Dover Railway Company*,

(1) 10 Ves. 41.
(2) 4 Ves. 542.
(3) Kay, 592.
(4) Law Rep. 2 Ch. 201.
(5) 3 Ch. D. 185.

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it is to be in the fruit only. In *Bunting* v. *Marriott* (1) bonds of the *Tothill Fields* Improvements to secure money borrowed by them on the credit of the rates under the Act, and in *Edwards* v. *Hall* (2) shares in an incorporated company, were held not to be interests in land within the *Statute of Mortmain;* while in *Entwistle* v. *Davis* (3) the shares of a company, the business of which was the purchase and improvement of lands, were also held not to be within the statute.

There is no distinction in principle between a trading corporation supplying water for money, and a municipal corporation doing the same; nor between a mortgage by one of its "works" (which must mean its waterworks), "rents, and rates," and by the other of its "undertaking" (a word completely analogous to works), "rents, and rates." Neither can be held to confer on the mortgagee the right to prevent the undertaking, for the purposes of which the mortgage was given, from being carried on, and so to expose the company to the penalties which would result if land which must remain in them for the purposes of their undertaking was taken away from them and given to a charity.

Judgment.

HALL, V.C:—

The Act of Parliament under which the mortgage in question was created is an Act for improving and regulating the town of *Aberystwith* and supplying the inhabitants thereof with water; it provides for rates being levied by the commissioners, it gives power to distrain upon the occupiers for those rates, it authorizes them to acquire property for the purposes of their undertaking, and it authorizes them to borrow money. [His Lordship then stated section 150, and the form of mortgage thereunder.] The security in question is made under the power and in the form given by the Act, and the question is, whether such a security is capable of being disposed of in favour of a charity; in other words, whether it is within the *Statute of Mortmain.* The cases upon the statute have certainly not been uniform. One of the earliest cases upon the subject is *Knapp* v. *Williams*, reported in a note to the case of *Corbyn* v. *French* (4). That case was decided by Lord *Eldon,*

(1) 19 Beav. 163.
(2) 6 D. M. & G. 74.
(3) Law Rep. 4 Eq. 272.
(4) 4 Ves. 430.

in 1798, and his Lordship in his judgment said: "It occurred to me that it had been determined that a mortgage of turnpike tolls is within the statute"—this was a case of turnpike tolls.—"The mortgagee would have a right to come into this Court to have an account and a receiver appointed. He would have a right, by the aid of this Court, to have the tolls specifically applied to his mortgage. Consider what the point of law is from the nature of the interest. It is not at all within the mischief; but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the Act these tolls, granted in perpetuity, are certainly a hereditament; it is in its nature an interest affecting land. He might bring an assize for these tolls, I should think. There is another species of toll which gives no right at all in the land, that is a toll thorough."

The case which has been referred to of *Howse* v. *Chapman* (1) was also before Lord *Eldon*, and there a similar question arose as to certain bonds which had been given to the commissioners for the improvement of the city of *Bath*. The exact nature of those bonds does not, I think, appear from the report, but there were inquiries taken and accounts directed, and the master in his report says: "That part of the personal estate which was held not to pass by the bequest for the improvement of the city of *Bath* consisted of mortgages to the amount of £4950, five bonds of the commissioners for the improvement of the city of *Bath*, four bonds of the corporation of *Bath*, and four bonds of the commissioners of a turnpike." And the report refers to *Knapp* v. *Williams* as the authority upon which that holding in *Howse* v. *Chapman* proceeded. So that we have here two decisions, as I must take it, of Lord *Eldon* upon this question of turnpike bonds and bonds of the commissioners for the improvement of the city of *Bath*. Those two decisions were followed by Sir *William Grant* in *Finch* v. *Squire* (2). The question was considered again in *Myers* v. *Perigal* (3), and two classes of property were the subject of the decision in that case, one, shares in a joint stock bank, and the other, a debenture or security in the nature of a bond or

(1) 4 Ves. 542. (2) 10 Ves. 41.
(3) 16 Sim. 533, 542.

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promise to pay by the *Newcastle and Carlisle Railway Company;* and there Vice-Chancellor Sir *Lancelot Shadwell* considered that the debenture in question was not within the *Statute of Mortmain.* The Vice-Chancellor, however, based his decision in that case upon grounds which would certainly not embrace the security or mortgage in the present case; for in giving judgment in that case he says, in reference to the 62nd section of the Act there in question by which justices of the peace might, upon the request of a mortgagee thereunder appoint a receiver (1), "the language, you will observe, is 'to receive the whole or such part or parts of the said rates as are liable to pay the interest.' But by the debenture in question the rates are not made liable at all. It contains nothing that amounts either to an assignment of the rates or to a declaration that they shall be liable. It amounts to nothing more than a promise to pay £600, or so much money borrowed on the credit of the undertaking. Therefore it cannot give the holder, whose interest is in arrear, any right to apply to the justices of the peace, under the 62nd section of the Act, to appoint a receiver of the rates." Then he comments upon that section, and shews that it does not apply. That appears to me to be the ground on which the Vice-Chancellor rested his decision with regard to the security in *Myers* v. *Perigal* (2), and the case is accordingly no authority in favour of the Plaintiffs in this case, but, on the contrary, the judgment being based on the special form of the security, it rather goes the other way. The decision of Vice-Chancellor *Shadwell* upon this point was not the subject of the appeal (3), but we cannot fail to see that when the case came before Lord *St. Leonards,* upon appeal as to the question of the shares, he guarded himself particularly from expressing any opinion in favour of the validity of the disposition as to the debenture. Therefore that case is in neither Court an authority in favour of the parties who contend here that these debentures pass effectually, notwithstanding the *Statute of Mortmain.*

In the case of *Ashton* v. *Lord Langdale* (4) Vice-Chancellor *Knight Bruce* certainly expressed his view as being that such a security as this was an interest in land within the *Mortmain Act.*

(1) 16 Sim. 542.
(2) Ibid. 533.
(3) 2 D. M. & G. 599.
(4) 4 De G. & Sm. 402.

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In *In re Langham's Trusts* (1) Vice-Chancellor *Wood* held a bequest of shares in a canal navigation company for charitable uses to be good; but a bequest of securities upon the tolls, rates, and duties, and upon the general estate of the company, created by assignment thereof by way of mortgage, to be void, as being a charge upon land within the meaning of the statute; and he took the same view in the subsequent case of *Thornton* v. *Kempson* (2). On the other hand, in *Walker* v. *Milne* (3), Lord *Langdale*, M.R., held, in 1849, that dock and canal shares and bonds, secured by an assignment of rates, was not an interest in land within the statute. And again, in *Ion* v. *Ashton* (4), *Romilly*, M.R., held that a charge upon tolls was within the *Statute of Mortmain*, while the same Judge, in *Bunting* v. *Marriott* (5), held that *Tothill Fields* Improvement Bonds were not. The judgment on this point is, however, very short, and the nature of these bonds does not very clearly appear, but it seems from the statement on page 164 of the Report that they were "bonds from the trustees of the *Tothill Fields* Improvements, to secure money borrowed by them on the credit of the rates." *Edwards* v. *Hall* (6) was the case of shares in an incorporated company, and Lord *Cranworth* there held that such shares were not within the *Statute of Mortmain*, apparently considering that the fact of the company being incorporated had a bearing on the question. There is, however, a distinction between the case of shares and bonds which was recognised by Lord *St. Leonards* in *Myers* v. *Perigal* (7). There may also well be distinctions between shares in one company and in another, though the number of the persons constituting each company would not affect the question. A partner in an ordinary company has no interest in land vested in the company within the *Statute of Mortmain*, and this may be said as to shares, whatever be the constitution of the company.

I have now substantially referred to all the authorities down to *Holdsworth* v. *Davenport* (8), before Vice-Chancellor *Malins*. The debenture in question there was that of a trading company, and

(1) 10 Hare, 446.
(2) Kay, 592.
(3) 11 Beav. 507.
(4) 28 Beav. 379.
(5) 19 Beav. 163.
(6) 6 D. M. & G. 74.
(7) 2 D. M. & G. 599.
(8) 3 Ch. D. 185.

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the case is open, therefore, to the observations of Vice-Chancellor *Wood* in *Thornton* v. *Kempson* (1) as to the distinction between companies that are and companies that are not trading companies. The Vice-Chancellor, in *Holdsworth* v. *Davenport* (2), in commenting upon the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (3), which, as I collect, was in reality the foundation of his judgment, states that case to have "decided that a mortgage debenture made by a railway company in the form given in Schedule C. of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company or the proceeds of the sale of them so as to entitle him to an order for a receiver of the sale moneys or interim rents." In the case before him there was an assignment of "the undertaking called the *Sheffield Waterworks*, and all future calls on shareholders, and all the rents, rates, and sums of money arising by virtue of the several Acts relating thereto, and all the estate, right, title, and interest of the company in and to the same until the sum of £2275, together with interest for the same at the rate of £5 per cent., should be fully paid." That form of security left the parties taking it in the same position as the debenture holders in *Gardner* v. *London, Chatham, and Dover Railway Company;* but it is to be observed that in the latter case the form of the security given was such that, upon the true construction of the debenture, it did not give the holder the right which he was seeking in that case to have enforced. That was expressly held in the judgment of Lord Justice *Turner* (4), who put it entirely on that ground. And as to that the argument for the Defendant has a strong bearing, that is, that necessarily, from the character of the undertaking and the nature of the security, it is not a fair construction of the instrument to hold that the parties were ever intended to be in a position to take the undertaking itself or anything but the fruit of the going concern; and that what the debenture holder in that case was proposing to do would have the effect of stopping the concern altogether. Those observations have an important bearing upon the question whether the principles of the decision in

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(1) Kay, 599.
(2) 3 Ch. D. 185.
(3) Law Rep. 2 Ch. 201.
(4) Ibid. 220.

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Gardner v. *London, Chatham, and Dover Railway Company* (1), when applied to a case like this, would shew that the holder of the security in this case would not have an interest in the land.

The decision of Vice-Chancellor *Malins* in *Holdsworth* v. *Davenport* (2) is unquestionably entitled to very great weight; but it seems to me that I cannot, consistently with the decisions of Lord *Eldon* in *Knapp* v. *Williams* and *Corbyn* v. *French* (3), followed, as they have been, by Sir *William Grant* in *Finch* v. *Squire* (4), and by the other eminent Judges to whom I have referred, consider myself at liberty, if I were so inclined, to hold that the debentures in this case are not interests in or charges on land within the *Statute of Mortmain*. I must, therefore, hold them to be within that statute, and declare that they cannot be the subject of a charitable bequest.

Solicitors: *Barton & Pearman; Bolton, Robbins, & Busk*, agents for *Howell & Morgan, Machynlleth; Norton, Rose, Norton, & Brewer.*

In re LEIGH, DECEASED. ROWCLIFFE *v.* LEIGH.

[1875 L. 100.]

V.-C. H. 1876 *Nov.* 16.

Practice—Judicature Act, 1873, *ss.* 56–59—*Official Referee—Order as to Production of Documents—Appeal from—Rules of Court*, 1875, *Orders* XXXI., *r.* 11; XXXVI., *r.* 32.

In actions which have been referred under the 57th section of the *Judicature Act* of 1873, orders for the production of documents may be made by the Judge who has directed the reference. Whether they can also be made by the referee, *quære*.

An application in the nature of an appeal will lie to such Judge from any order made by a referee.

Statement.

THIS was an action to administer the personal estate of the testator, Mr. *John Gerard Leigh*, in which a claim amounting to upwards of £19,000 was carried in by Mr. *Brooks*, a dealer in works of art, for pictures and articles of virtu supplied to the testator in his lifetime.

(1) Law Rep. 2 Ch. 201.
(2) 3 Ch. D. 185.
(3) 4 Ves. 430.
(4) 10 Ves. 41.

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The Defendant, Mrs. *Leigh*, the widow and executrix of the testator, disputed the claim, and, upon her application, the Vice-Chancellor, on the 1st of June, 1876, ordered (as reported (1)) the claim to be tried before the Official Referee in rotation. In the course of the proceedings before the Official Referee, Mr. *Brooks* made an affidavit as to documents to the sufficiency of which the Defendant Mrs. *Leigh* objected; and she accordingly applied to the Chief Clerk of the Vice-Chancellor for an order that Mr. *Brooks* should make a further affidavit as to documents. The Chief Clerk, however, considered that the matter was in the hands of the Official Referee, who was, under sect. 57, to conduct the trial as nearly as possible as trials before the Judge of the High Court, and that any order as to production of documents ought to be made by the Referee, and he accordingly declined himself to make it. Mrs. *Leigh* then moved before the Referee that Mr. *Brooks* might be ordered to make a full and sufficient affidavit as to documents, and the Referee made an order upon the motion, with which Mrs. *Leigh* was dissatisfied.

Argument.

Dickinson, Q.C., and *Method*, for the Defendant, Mrs. *Leigh*, now moved, "by way of appeal from the order of the referee or otherwise," that Mr. *Brooks* might be ordered to make a further affidavit as to the documents in his possession relating to his claim.

W. Pearson, Q.C., *Millar*, and *Moulton*, for Mr. *Brooks*:—

This is a motion "by way of appeal from the order of the referee or otherwise." Now, there is no provision in the *Judicature Act* or in the Rules of Court as to any appeal from the Official Referee to the Judge who has directed the reference, and the appeal, if any, must be to the Court of Appeal. By the 58th section of the Act the referees are to be "deemed officers of the Court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court," or "by the Court or Judge ordering such reference or trial;" and here no special powers were given by the order directing the reference; "and the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court) be equivalent to

(1) 3 Ch. D. 292.

the verdict of a jury." Then, by Order XXXVI., rule 32, subject to any special order made at the time of the reference, "the referee shall have the same authority in the conduct of any reference or trial as a Judge of the High Court when presiding at any trial before him;" while by rule 34 the Referee may, before the conclusion of any trial or by his report under the reference, "submit any question arising therein for the decision of the Court." The Defendant might, perhaps, have got a point referred to the Court under this last Order, but she has instead appealed from the Referee's order; and as he has, under these rules, the same powers and authorities as a Judge of the High Court, and there is no provision as to an appeal from any order made by him, it follows that the appeal, if any, can only be to the Court of Appeal. It was, however, the object of the Legislature that whenever a matter should be referred, the Referee should decide all the questions at issue between the parties. After the Court has directed the reference, it no longer has the substantial questions between the parties before it; the present order was entirely within the functions of the Referee, and in the absence of all provision as to any appeal from his orders, there is, in fact, no appeal at all from such an order as this.

Argument.

They then argued the case upon the merits, contending that the case to be tried before the Referee was simply a claim for goods sold and delivered, in which no issue of fraud was raised, upon which issue alone could the further documents in question be material, and the affidavit was, in fact, sufficient. They also objected that, in point of form, the motion should have also been to vary the order made by the Chief Clerk in Chambers.

Kekewich, for the Plaintiff in the action.

HALL, V.C., after stating that he did not intend the inquiry before the Referee to be limited to a mere question of goods sold and delivered without the whole transaction and merits being gone into as between the parties, continued:—

Judgment.

It has been contended that it is not competent for the Referee to make any order for production of documents, and that such an order can only be made by the Judge.

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The Referee is, and is acting as, the officer of the Court, and the Court does not by the reference to him deprive itself of the power which it would have in the ordinary course of proceedings in an action before itself, of making a proper order to facilitate the reference, or to deal with the matter arising upon the reference, whether the matter be referred to the Court by the Referee or not, or brought before the Court in a proper way. If the Referee can make orders for production, it appears to me that it must necessarily be subject to the control of the Judge, for I do not find anywhere, nor in answer to my inquiry have I been referred to, anything enabling the parties to go to the Court of Appeal upon such a question. It is said that these orders for production ought to be made by the Judge and not by the Referee. As far as I have considered the question I am rather disposed to think that that is the right view, and the better course will be in all cases where production of documents is wanted pending the proceedings before the Referee, that the application for the purpose should be to the Judge, because by Order XXXI., rule 11, it is expressly provided that the Judge may make an order for production of documents at any time during the pendency of any action or proceeding, and I do not find anything expressly giving the Referee that authority. Therefore, upon that Order alone I should have authority now to make an order to produce, even if this were within the jurisdiction of the Referee. The course taken in this case by the Defendant, Mrs. *Leigh*, of applying by summons in Chambers to obtain an order from my Chief Clerk, or in reality, from myself, appears to have been a right course, although the Chief Clerk seems to have thought that it was not, and that the parties ought to go to the Referee. The parties did go to the Referee, but I am clear that in any point of view I have jurisdiction upon this application to deal with the question as an application made to me for a further affidavit.

[The Vice-Chancellor then noticed the objection as to the form of the notice of motion, and after saying that it was idle to suppose that Mr. *Brooks* and his advisers had not had the fullest opportunity of meeting the motion, continued:—]

The words "or otherwise" are, in my judgment, quite sufficient to embrace, if necessary, an application to vary the order of the

Chief Clerk, or myself, in Chambers. But if there were any question about that, I would, if necessary, give the Plaintiff leave to amend his notice of motion by adding the words, "and if and so far as is necessary by way of appeal from" the order made by myself; and that would put an end to all question.

[His Lordship then dealt with the case on the merits, and held that Mr. *Brooks* must make a further affidavit.]

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Solicitors: *Gregory & Co.; Duignan & Smiles.*

In re WORMSLEY'S ESTATE. HILL *v.* WORMSLEY.

V.-C. H. 1876 *Dec.* 9.

[1876 H. 290.]

Will—Bequest of Leaseholds—Mortgage thereon—Locke King's Act (17 & 18 *Vict. c.* 113.)

Leaseholds are not within *Locke King's Act.*

Solomon v. *Solomon* (1) approved.

ADMINISTRATION ACTION.

Statement.

James Wormsley, who died in November, 1875, by his will, dated the 19th of April, 1875, bequeathed to his son, *Senior James Wormsley*, two leasehold houses in *North Street, Fulham Road*, "subject to the mortgage debt secured thereon;" and he bequeathed to his daughter *Mary*, the wife of *Jeffrey Hill*, four leasehold houses in *North Street* aforesaid, "subject to the mortgage debt secured thereon;" and he then bequeathed his two remaining houses in *North Street* aforesaid to his son, *Senior James Wormsley*, and the Plaintiff, *Charlotte Ann Hill*, equally as tenants in common. These last-mentioned leasehold houses were also subject to a mortgage, as to which the will was silent, and the only question in this action was whether the legatees took them subject to the mortgage, or were entitled to have it paid off out of the general personal estate of the testator.

(1) 33 L. J. (Ch.) 473.

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Argument.

Cottrell, for the Plaintiff:—

The terms of *Locke King's Act*, and particularly the expression "the heir or devisee to whom such land or hereditaments shall descend or be devised," shew that it was not intended to apply to leaseholds. Moreover, it has been expressly decided that leaseholds are not within the Act: *Solomon* v. *Solomon* (1). These mortgages ought accordingly to be paid out of the general personal estate.

Dickinson, Q.C., and *F. T. White*, for the Defendant, who was the executrix of the testator:—

With the exception of the expression noticed by the other side, the whole of the Act is in terms strictly applicable to leaseholds. The preamble recites that it is "expedient that the law whereunder the real and personal assets of deceased persons should be administered should be amended," and then the Act provides what is to happen when "any person shall die seised of or entitled to any estate or interest in any land or other hereditaments." In the face of an expressed intention thus to alter the law, and considering that a leasehold is an estate or interest in land, the subsequent use of the words "heir or devisee," "descend or be devised" (which may well include a legatee and bequest of leaseholds), are not enough to shew that the Legislature intended to alter the law as to one description of estate or interest in land, and at the same time to leave it unaltered as to another. Then the case of *Solomon* v. *Solomon* is not a direct decision that leaseholds are not within the Act, for all that the Master of the Rolls there decided was that the mortgage debt in that case must be borne by the leaseholds and other residuary personal estate in proportion to their respective values. On the whole, we submit that *Locke King's Act* applies, and that these legatees are not entitled to have this mortgage paid off out of the general personal estate of the testator.

Judgment.

HALL, V.C.:—

I consider that the decision of the late Master of the Rolls in *Solomon* v. *Solomon* was clearly a decision that leaseholds are not

(1) 33 L. J. (Ch.) 473.

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included in *Locke King's Act.* That has been the law for a long time, and I have no doubt that it has been acted upon in many cases. Moreover, looking at the Act, I must say that I myself should, in the absence of that decision, have taken the same view. I desire, therefore, that it be understood not only that I follow the decision of the Master of the Rolls in *Solomon* v. *Solomon* (1), but that I construe the Act in the same manner as he did.

Solicitors: *S. P. Clare; J. Letts.*

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1876
Nov. 27, 28, 29, 30; *Dec.* 4, 5, 6, 8.
1877
Jan. 15.

[1873. H. 17.]

Manor—Rights of Common—Freeholders and Copyholders—Right of Lord to take and sell Marl—General Words in Conveyance—Injunction, Form of.

General words in a conveyance by the lord of a manor of (*inter alia*) a small parcel of land which had been copyhold and was afterwards surrendered to extinguish the copyhold tenure, *held* not to recreate rights of common.

The lord of a manor may take gravel, marl, loam, and subsoil in the waste, for his own use and for the purpose of sale, so long as he does not infringe upon the rights of the commoners.

On the question whether the loam is taken to such an extent as to interfere with right of common, the *onus probandi* is on the tenant and not on the lord as in the case of approvement.

Statement.

THE Plaintiffs were *William* and *James Hall*, and they, on the 17th of January, 1873, filed this bill on behalf of themselves and all others the freehold tenants of the manor of *Coulsdon, Surrey*, and all other persons being owners of lands or tenements copyhold, or formerly freehold or copyhold, of the manor (except the Defendant and except as to lands now already inclosed), and such of the tenants and owners as were thereinafter alleged to have sold their commonable rights over such lands to the Defendant, viz., *Edmund Byron*, the lord of the manor.

The object of the suit was to establish rights of common over a group of downs and commons in the above manor, and to obtain an injunction for their preservation. The Plaintiffs resided in the

(1) 33 L. J. (Ch.) 473.

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parish of *Coulsdon*, and were, as to *William Hall*, the owners by purchase in the years 1863 and 1870, and as to *James Hall*, by conveyance of twenty-four acres, part of the property purchased by *William Hall*, of about 300 acres of land; and they claimed a right of common of pasture for commonable cattle and sheep levant and couchant. The manor was conterminous with the parish. Its extent was about 4315 acres, of which about 400 acres were waste, and its commons, or alleged commons, consisted of *Riddles Down* (about seventy-seven acres), *Farthing* or *Fairdean Down* (about 126 acres), *Kenley* (about seventy-seven acres), and *Coulsdon Common* (about eighty-eight acres), and a heath and three greens, called *Bradmore*, *Lacey*, and *Lion*, and two acres of waste near to *Lacey Green* which the Defendant claimed as being private property. The Plaintiffs claimed to be by themselves and their predecessors in title ancient freeholders of the manor, and as such entitled to a right of pasturage over all the commons of the manor, and this right, if established, would, as the manor was within the radius of the *Metropolitan Commons Act*, prevent the inclosure of any part of those commons except by Act of Parliament, or with consent of all persons accustomed to turn out upon the wastes; and they alleged that, without their consent, the Defendant was making gradual encroachments on the commons, which, though of small extent when taken one by one, were of considerable gravity when taken together.

The Defendant's case was, that no such right of common as that claimed by the Plaintiffs existed in fact; that such right as existed was confined to owners of ancient copyhold tenements; that the Plaintiffs had not made out their title as ancient freeholders, and that their rights as copyholders were confined to the common nearest to the tenement in respect of which the right was exercised, viz., *Riddles Down*, and, as to that down, was confined to about five and a half acres, and was limited to one sheep an acre; and further, that he had never yet interfered, and never intended to interfere, with the rights of the commoners without their consent.

The evidence, which was very voluminous and conflicting, extending from the Domesday Survey to the present time, and the arguments, are sufficiently referred to in the judgment.

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Joshua Williams, Q.C., *H. Matthews*, Q.C., and *Whately*, for the Plaintiffs, referred to *Betts* v. *Thompson* (1); *Warrick* v. *Queen's College, Oxford* (2); *Swinnerton* v. *Marquis of Stafford* (3); *Swayne's Case* (4); *Badger* v. *Ford* (5); *Arlett* v. *Ellis* (6); *Smith* v. *Earl Brownlow* (7); *Co. Litt.* (8); *Lloyd* v. *Earl Powis* (9); *Arundell* v. *Lord Falmouth* (10); *Musgrave* v. *Inclosure Commissioners for England and Wales* (11); *Taylor* on Evidence (12); *Scriven* on Copyholds (13).

Dickinson, Q.C., *Bristowe*, Q.C., and *Morshead*, for the Defendant, referred to *Cheesman* v. *Hardman* (14); *Cruise's* Digest (15); *Scriven* on Copyholds (16); *Sadgrove* v. *Kirby* (17); *Shakespear* v. *Peppin* (18); *Viner's* Abridgment (19); *Smith* v. *Fetherwell* (20); *Betts* v. *Thompson*; and *Statute of Merton* (20 Hen. 3, c. 4).

J. Williams, in reply.

Judgment.

1877. Jan. 15. HALL, V.C., after stating the nature of the suit and the right which the Plaintiffs sought to establish by it, continued:—

The Plaintiffs claim in respect of tenements which *William Hall* purchased in 1863, viz., a freehold estate known as *Hayes and Roke Farm*, comprising 133 acres, the greater part thereof being, as alleged by the bill, ancient freehold tenements held of the manor by three several quit rents, one of which was 5*s.* 10*d.* (the only one of the quit rents I need mention, as the Plaintiffs' evidence has had reference only to property subject to that quit

(1) Law Rep. 6 Ch. 732, 739.
(2) Ibid. 10 Eq. 105; 6 Ch. 716, 729.
(3) 3 Taunt. 91.
(4) 8 Rep. 63a.
(5) 3 B. & A. 153.
(6) 7 B. & C. 346.
(7) Law Rep. 9 Eq. 241.
(8) 2 Inst. 85, 88.
(9) 4 E. & B. 485.
(10) 2 M. & S. 440.
(11) Law Rep. 9 Q. B. 162, 173.
(12) 5th Ed. vol. i. p. 591.
(13) Vol. i. pp. 10, 11.
(14) 1 B. & A. 706.
(15) Vol. iii. p. 70.
(16) Vol. i. p. 375.
(17) 6 T. R. 483, 486.
(18) Ibid. 741.
(19) Vol. iv. 587, 588.
(20) 1 Freem. 190; 2 Mod. 6.

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rent), and the residue thereof being, as alleged by the bill, formerly copyhold, but enfranchised in October, 1863, under the provisions of the Enfranchisement Acts.

William Hall, in August, 1864, sold about twenty-four acres, part of the estate so purchased, to the Plaintiff *James Hall*. That part did not comprise any of the enfranchised copyhold. *William Hall* made a settlement of other part of the estate, and retained about eighteen acres, which, the bill alleges, contained all or part of the enfranchised copyholds and part of the ancient freehold tenements, *i.e.*, the tenements in respect of which the 5*s.* 10*d.* quit rent was paid. The claim of each of the Plaintiffs for the freehold tenants (*i.e.*, not including the freeholders by enfranchisement or the copyholders) is in respect of his being, as he alleges, the owner of part of the tenement in respect whereof the 5*s.* 10*d.* was and is payable, and to establish such ownership the Plaintiffs have gone into voluminous evidence.

I may at once dispose of *James Hall*. He has failed to make out any case in respect of his twenty-four acres, and consequently cannot have any decree in his favour.

As to *William Hall*, after having heard lengthened and elaborate arguments, consisting of a most minute examination of parcels in numerous deeds, plans, surveys, and other documents, and after having myself devoted a great deal of time to the investigation of this part of the case, I have come to the conclusion that he has made out that he is the owner of a small parcel of the property out of which the 5*s.* 10*d.* is issuing, and that this entitles him to maintain the bill on behalf of the freehold tenants. In the course of the argument the Plaintiffs' counsel were obliged to vary their mode of identification, and the Plaintiffs' case was certainly, during the greater part of the trial, in a most confused and unsatisfactory condition, occasioned mainly by the descriptions in the bodies of, and schedules to, certain deeds (dated in 1834 and 1839), being supposed to shew or indicate a different source of title to that part of the eighteen acres which, it was contended, was subject to the 5*s.* 10*d.*, than the source of title to the property subject to that rent. This was, I consider, to a considerable extent, cleared up by the discovery and production, during the trial, of an early title deed—I mean the deed of the 1st of May,

1792; and although there is, no doubt, embarrassment arising from the descriptions in the deeds of 1834 and 1839, the latter of which, at least, is carelessly framed, the copyholds being described along with and as part of the freeholds, and again described as copyholds, I am satisfied that the supposed discrepancies may be accounted for by considering that the descriptions "*Sandy Field*" and "part of *Sandy Field*" occurring in those places which it is said displace *William Hall's* case, are either errors or are to be referred to other lands having acquired a similar name to that of other land which he is the owner of, and claims title to, as part of the property subject to the 5*s.* 10*d.*

William Hall has, I think, also established his title to a small piece of freehold land which was enfranchised under the *Copyhold Enfranchisement Act*, and I hold that he is entitled in respect of such land to maintain this suit on behalf of himself as owner of land formerly copyhold, and on behalf of other persons who were copyholders and have enfranchised in like manner, and of the owners of land copyhold of the manor. He has sought to maintain the suit as owner of a farm called *Old Lodge Farm*, which he purchased from the Defendant in the year 1870. A small part of this was copyhold; it was surrendered so as to extinguish the copyhold tenure; it was not enfranchised under the *Copyhold Enfranchisement Act.* When *William Hall* purchased this farm it had no right of common appendant or appurtenant. The conveyance to him conveyed the farm and whatever would pass by such conveyance under the general words, which were, "Together with all houses, outhouses, edifices, buildings, fixtures, barns, stables, yards, gardens, orchards, roads, ways, paths, passages, waters, watercourses, hedges, ditches, fences, lands, meadows, feedings, commons and all commonable rights, timber and other trees, woods, underwoods, liberties, advantages, rights, members, and appurtenances whatsoever, actual and reputed, to the said messuages, lands, hereditaments, and premises hereinbefore conveyed or intended so to be belonging or in anywise appertaining therewith or with any part thereof, held, used, and enjoyed, and all the estate, right, title, trust, use, inheritance, interest, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said *Edmund Byron*,

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or in, to, or out of the same messuages, lands, hereditaments, and premises, and every part thereof." It was contended that by these words a right of common was created. There was evidence of enjoyment several years previously to the date of the conveyance of common right with this farm; but there was no evidence of enjoyment or reputation at the date of the conveyance, not even the occupier at that time being called; and I have not been able to come to the conclusion that, by means of the general words in question, common rights were recreated. Several cases were referred to by the Plaintiffs' counsel as authorities that such common rights were recreated, but they were cases of a special character, being cases under Inclosure Acts, and it has been considered in some of those cases that the decisions are to be referred to the special character and provisions of such Acts. There are many cases upon the construction of deeds which were not referred to, but which are authorities adverse to the Plaintiffs' contention. Of these I may mention *Bradshaw* v. *Eyre* (1), *Worledge* v. *Kingswell* (2), *Clements* v. *Lambert* (3), and *Marsham* v. *Hunter* (4). It seems significant that the words "or heretofore or at any time heretofore," which are part of the general words given by Mr. *Davidson* in his ordinary form of a conveyance, are left out in a case where they were specially appropriate if it was intended to recreate rights of common.

The Plaintiff, *William Hall*, has gone into evidence to establish a right to common as a freeholder in respect of other freehold lands, but in the bill the issues were limited to the lands specifically mentioned, and I thought, and still think, that if a Plaintiff, in a case like the present, states, as I think he did, "I am suing in respect of certain specified lands," he should not go into evidence as to other lands. The Defendant has a right to learn from the bill, or, where the bill is not distinct, from particulars obtained by him, to what particular lands he must address his defence and evidence.

The Defendant has contended that the rights of common were limited in several ways: one limitation was that there was to be only one sheep per acre; another was that each tenant could turn

(1) Cro. Eliz. 570.
(2) Ibid. 794.
(3) 1 Taunt. 205.
(4) Cro. Jac. 253.

out only on the common adjoining his tenement or connected with such common by a road connecting the two commons; and, further, that the right of common was limited to sheep. I think all these contentions failed. There is evidence sufficient to establish here the ordinary rights of common of pasture; and the evidence to the contrary is all to be referred to arrangements made for mutual convenience, it not having the effect of permanently qualifying in law the actual rights. And as regards sheep only having generally been turned on, that is accounted for by the character of the herbage on the common.

The bill states that several inclosures have been made by the Defendant, and it asks that he may be restrained from suffering to remain or be inclosed any part of the common. By the answer it appeared that several of these inclosures were made under arrangements with tenants, the Defendant having transferred, or, as to one of them, agreed to transfer to them his estate and interest, and the inclosures having been made by the tenants. As to one of these (*Lion Green*), it appeared to have been inclosed after the institution of the suit, and the Plaintiffs then amended their bill by limiting the relief they had asked to inclosures in the possession or power of the Defendant. This amendment excludes four or five inclosures, leaving still within the relief asked the following inclosures: first, a strip of land adjoining a new road made by the Defendant across one of the commons. In the bill this land is stated to be nine acres. In the answer it is stated to be 4A. 0R. 28P.; secondly, a piece of land, part of *Lacey Green*, containing twelve perches; and, thirdly, a few roods annexed to several cottages. As to these three inclosures, I do not think the second and third are of sufficient importance to require me to deal with them. The first was inclosed early in 1872, about a year before the suit was instituted, and I should here mention that the Plaintiffs' bill, as originally filed, charged the Defendant with having made inclosures to a very much larger extent, viz., about fifty acres of the common adjoining the Plaintiffs' land and the whole of another common, which charge was struck out on the answer coming in. I do not think a decree of restitution in respect of so small a quantity of land as the strip of land above mentioned would have been sought for had not the greater claim

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been thought to exist and been put forward in the first instance; and, indeed, the Plaintiffs' counsel said, what occasioned the suit was the inclosure of *Lion Green* and the taking of loam. As regards the strip in question, it is, no doubt, valuable to the Defendant and to the person to whom he agreed to sell his interest in one of the five pieces above mentioned, on account of its frontage to the new road. On the other hand, it would not, if now thrown open so as to be commonable, be of much, if any, use to the commoners. As regards *William Hall* individually, he is so far from it that it would not be of any specific use to him, nor do I think it would materially indirectly benefit him by its being available for other commoners; and, considering that the Defendant, mainly at his own expense, made the new road, which I do not doubt is a great improvement, from which all the commoners directly or indirectly derive benefit, and that the road has been taken to by the parish, I do not feel called upon to grant a mandatory injunction in respect of it, although the Defendant has not, the *onus probandi* resting with him, established his title to it as being valid. To compel the restitution of this would, I think, under all the circumstances, be harsh, and I do not believe that the commoners, certainly not as a body, wish, and I doubt whether any one of them, except the Plaintiffs, wishes such a restitution. I say this after considering the evidence of those commoners who have stated that they approve of the Plaintiffs' proceedings to prevent inclosures and taking loam.

The bill further asks for an injunction to restrain the Defendant from cutting, digging, and removing the turf, soil, and subsoil of the commons, to the prejudice of the commonable rights over the same of the Plaintiffs and the other persons on whose behalf they sue. The bill alleges that the Defendant has caused to be dug on many parts of the common, and particularly on *Coulsdon Common*, large quantities of gravel, loam, and similar substances, and has caused the same to be sold at 10*s.* per cart-load, and has also recently caused to be cut or stripped off large portions of the turf on the common called *Riddles Down*, and that (this applying to as well the inclosures as the digging) the Plaintiffs and those they represent have already, by the Defendant's acts, to a great extent been deprived of and impeded in the exercise of their commonable

rights over the commons, and unless the Defendant be restrained from continuing to do such acts as aforesaid, they will be entirely debarred from the exercise of their said rights.

The Plaintiffs' counsel contended before me that a lord of a manor has no right to get or cut at all, or if at all, not for sale, turf, or loam, or subsoil, arguing that his so doing would be destructive of and repugnant to his grant, and therefore illegal. As regards gravel, however, no claim was made, the Plaintiffs' counsel saying this was not open to the same objection as turf, loam, and subsoil; but it does not appear to me that the lord's right to get gravel is, from the nature of the thing, different from that of getting loam, turf, and subsoil, except in this respect, that the right to get gravel so as permanently to destroy the herbage would ordinarily be less admissible than that of getting loam, turf, and subsoil, which is only temporarily detrimental to the tenants.

5 Ch D 754

The law I consider to be that the lord may take gravel, marl, loam, and the like, in the waste, so long as he does not infringe upon the commoners' rights, his right so to do being quite independent of the right of approvement under the *Statute of Merton* or at Common Law, and existing by reason of his ownership of the soil, subject only to the interests of the commoners. *Bayley*, J., in *Arlett* v. *Ellis* (1) said, "The lord has rights of his own reserved upon the waste; I do not say subservient to, but concurrent with, the rights of the commoners. He has a right to stock the common, and to every benefit to be derived from the soil, not inconsistent with the rights of commoners. And when it is ascertained that there is more common than is necessary for the cattle of the commoners, the lord, as it seems to me, is entitled to take that for his own purposes."

11 Ch D 831

That the lord may get gravel, &c., as above-mentioned, was laid down by Lord *Kenyon* in *Bateson* v. *Green* (2). In that case the lord was held entitled to dig clay pits, he selling the clay, and that although it was proved that there was not a sufficiency of common, as claimed by the tenants: the lord had in that case always dug the common when, where, and in what manner he pleased. In *Arlett* v. *Ellis*, in which it was held that a custom for the lord of the manor to inclose the waste without limitation

(1) 7 B. & C. 369. (2) 5 T. R. 416.

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or restraint was bad in point of law, but that a custom for him to inclose parcels of the waste, leaving a sufficiency of common, was good, even against common of turbary. *Bayley*, J., referred to *Bateson* v. *Green* (1), saying that the extent to which the right of digging clay had been carried in that case, did not appear to be unreasonable, and that Lord *Kenyon*, in delivering judgment, intimated that there was no evidence to shew that the right had been more exercised of late years than formerly, and he said that it was not unreasonable that the lord should reserve the right of taking marl or limestone, it being not a permanent depriving of the tenant of the benefit derived from the surface of the land.

In reference to *Bateson* v. *Green*, Lord *Cottenham* said, in *Hilton* v. *Earl of Granville* (2), "There are very strong authorities in support of the Plaintiff's proposition, and there are others which appear to me to be quite irreconcilable with the principle laid down in those cases. No doubt the modern cases are in favour of the Plaintiffs. *Bateson* v. *Green* is the strongest case against him, and is not professedly overruled in any of the subsequent cases, though attempts have been made—a practice often resorted to, and perhaps not always productive of good—to reconcile that decision with the others to which the Courts have come. I find, however, these very contrary decisions, and I find the well-known and established rule of copyhold law, that in the case of opening mines and in the case of timber, at least, there is nothing inconsistent in a custom which derogates from the grant. It is quite impossible to say, in the case of the common and ordinary copyhold grant of land, nothing specific passing between the parties, that the custom to enter on the land and cut down all trees is not a derogation from the grant, if you look at the nature of the grant and the terms used in it: the custom, however, overrides the grant, and the grant is taken subject to the custom; so that there is nothing inconsistent, unless there be something unreasonable, and therefore illegal, in the custom. Now it is perfectly well established that a custom is good which authorizes the lord to come on his copyhold land to open a shaft and work a mine: it may be destruction to the copyhold, but if the custom is proved, it is a good custom. So it is a good custom for the lord, after having granted land with the

(1) 5 T. R. 411. (2) Cr. & Ph. 283, 293.

timber growing on it, to enter on the land and to cut down the timber: if there is no custom, neither the landlord nor the tenant can cut down the timber: if there be a custom in favour of either the one or the other, the right exists, and the law will protect the exercise of that right. As a general proposition, therefore, that there can be no custom which derogates from the grant, I apprehend all the authorities, and the well-known law on the subject of timber and mines, shew that the principle cannot be carried to that extent. *Bateson* v. *Green* (1) undoubtedly is a striking instance to the contrary."

Lord *Denman*, in his judgment in *Hilton* v. *Earl of Granville* (when at law (2)), said (3): "The greatest reliance, however, was placed on some decisions in which a custom derogatory to the lord's oral grant has been holden valid. *Bateson* v. *Green* is the strongest of these cases, where the lord of a manor defended himself successfully against a commoner whose extent of common he had curtailed by taking clay, on proof that the lord had constantly done so. The language of Lord *Kenyon* is certainly large, though considered by *Bayley*, J., in *Arlett* v. *Ellis* (4), to be subject to some restriction. If, indeed, it must be taken to import that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported in principle. The two decisions in the notes to *Bateson* v. *Green* are much more cautiously worded; and in that of *Folkard* v. *Hemmett* (5) Lord Chief Justice *De Grey* expressed himself conformably to what we consider the true legal principle: 'The Defendants justify under the usage. I will not call it a custom, because I look on it as a reserved right of the lord'; and assuredly whatever the lord can reasonably be supposed to have reserved out of his grant the usage may adequately prove that he did reserve. But a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing

(1) 5 T. R. 411.
(2) 5 Q. B. 701.
(3) 5 Q. B. 729.
(4) 7 B. & C. 346.
(5) 5 T. R. 417.

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granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too clear from the simple statement to admit of illustration by argument;" but what is there said as to an actual grant being produced was overruled in *Rowbotham* v. *Wilson* (1), and see the judgments of Lord *Hatherley* and Lord *Chelmsford* in *Duke of Buccleuch* v. *Wakefield* (2), the latter saying: "Even then, if *Hilton* v. *Earl of Granville* (3) is an authority that where there is nothing to shew for the right but a customary exercise of it, the custom cannot be supported (which, I think, is open to question), yet the *dictum* of Lord *Denman* in that case, that a grant in specie to the effect of the custom could not be supported, has been since overruled."

It is not necessary for me to say in the present case whether or not *Bateson* v. *Green* (4) is a sufficient authority for the proposition that the lord may by custom get clay, although he thereby does not leave sufficient common, because it is not established in evidence that the Plaintiffs' rights, or those of any other commoner, have been in any way interfered with by the digging or cutting of loam, gravel, or subsoil. I may, however, refer to the case of *Marquis of Salisbury* v. *Gladstone* (5), in which copyholders set up a custom to dig clay without limit out of their copyhold tenements for the purpose of making it into bricks to be sold off the manor, which was held a good custom, Lord *Cranworth* saying: "In truth, I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom;" and Lord *Chelmsford* referred to *Bateson* v. *Green* without disapproval; and in *Lingwood* v. *Gyde* (6) *Willes*, J., said that a customary right to waste both commissive and permissive was established to be good in law by the decision in *Marquis of Salisbury* v. *Gladstone*.

(1) 8 H. L. C. 348.
(2) Law Rep. 4 H. L. 399, 410.
(3) 5 Q. B. 701.
(4) 5 T. R. 411.
(5) 9 H. L. C. 692, 701.
(6) Law Rep. 2 C. P. 77.

The Plaintiffs' counsel, in support of his argument, relied on *Wilson* v. *Willes* (1), where Lord *Ellenborough* held that the tenants could not claim an unlimited right to cut turf to ornament their gardens; that is, that such a custom would be bad in law. That case no doubt will be important to be considered when a case like *Bateson* v. *Green* (2) comes before the Court, and it has to be determined whether or not it is to be followed, regard being had to all the subsequent decisions bearing upon it. Mr. *Joshua Williams*, in his very able argument, stated that *Wilson* v. *Willes* was the case of the tenants, and not of the lord, but that the same principle was applicable. If the same principle be applied, then it would have to be considered whether or not the lord may not establish a right involving total destruction of the thing granted as the tenants did in *Marquis of Salisbury* v. *Gladstone* (3). However, I do not, as at present advised, accept without question the proposition that the same principle is applicable. It may be that the lord being the grantor cannot establish, as a reservation out of his grant, that which in the absence of production of the grant itself is plainly unreasonable, and, therefore, should be referred to accident or indulgence, and not to any right conferred in ancient times.

Although the Plaintiffs have not established by evidence that the right of common has been interfered with by the digging or cutting of loam, turf, or subsoil, it may be that they are entitled to an injunction in respect of such digging or cutting, qualified as the injunction was in the *Commissioners of Sewers of the City of London* v. *Glasse* (4), *i.e.*, so as to prevent the exercise of the right of common. It appears to me that it is sufficiently alleged by the bill that the Defendant will, unless restrained, dig and cut loam and turf so as to interfere with the right of common, and that the Defendant's statement in his answer, to the effect that he does claim a right to dig, without interference by the Plaintiffs (I think this means as owner of ancient freehold), or any persons other than the owners of ancient copyhold tenements, the rights of freeholders being here denied, entitles the Plaintiffs to a qualified injunction: as to this I may refer to the case of *Hext* v. *Gill* (5), where the De-

(1) 7 East, 121.
(2) 5 T. R. 411.
(3) 9 H. L. C. 692, 701.
(4) Law Rep. 19 Eq. 134.
(5) Law Rep. 7 Ch. 699.

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fendant denied having any present intention, but claimed the right, and the Court granted the injunction. The Defendant does not by his answer claim to be entitled to dig and cut loam and turf, not leaving sufficient of the wastes for the commoners, which if it had been claimed would have required me (had there been evidence establishing that the Defendant had exercised such alleged right) to say whether or not *Bateson* v. *Green* (1) is or is not to be followed. I should add that I do not think there is ground for the suggested distinction that the lord cannot dig or cut for the purposes of sale. In reference to this question of right, I consider the *onus probandi* is on the tenant, and not, as in the case of approvement, on the lord. The *onus probandi* being on the lord in the case of approvement, would seem to arise from this, that the lord having made a grant over the whole waste, his right to inclose is treated as a right conditional upon his establishing that there is sufficient waste left for the tenant to enjoy the right of common granted, whereas as regards the lord's getting marl, that is, by virtue of his ownership of the soil, subject only to the tenants complaining, if they can establish their complaint, of his unduly availing himself of his ownership of the soil, just as the tenants may complain that the lord turns too many beasts on to the common, in which case the *onus probandi* would be on them.

I have now dealt with all the questions which have arisen in this case, and which are, in my opinion, material to be dealt with. The decree will be according to the minutes which I have sketched.

This is a case in which I consider it right not to give costs to either of the parties. In *Betts* v. *Thompson* (2) the Lord Chancellor varied the decree of the Master of the Rolls by not giving the Plaintiff costs. I do not say that the present case is similar in all respects to that, but I consider neither party should, under all the circumstances of this case, pay costs to the other.

MINUTES OF DECREE:—Declare that the Plaintiff *William Hall*, as owner of part of the lands within the manor of *Coulsdon*, out of which a quit rent of 5*s*. 10*d*. is payable, and as owner of lands and tenements which were copyhold

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(1) 5 T. R. 411. (2) Law Rep. 6 Ch. 732, 739.

of the said manor and have been enfranchised under the Copyhold Enfranchisement Acts, and the other freehold tenants of the said manor, and the other owners of lands and tenements which were copyhold held of the said manor and have been enfranchised as aforesaid, and the copyhold tenants, except such persons as the Plaintiffs in their bill except from the persons on whose behalf they sue, are entitled, in right of and as appendant or appurtenant to their several lands and tenements held of the said manor, to a right of common of pasture upon all the waste lands of the said manor for all manner of cattle levant and couchant upon their respective lands within the said manor; and let the Plaintiff *William Hall*, and the other persons entitled as aforesaid, be quieted in the possession and enjoyment of their said rights.

Injunction to restrain Defendant, his agents and workmen, from inclosing any part of the said waste lands now uninclosed, and from carrying away or destroying the loam or soil of the said waste lands now uninclosed, or the pasture or herbage being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the Plaintiff *William Hall* or the other persons entitled as aforesaid, or any of them, of their said rights hereinbefore declared in and over the said waste lands now uninclosed.

Solicitors: *Horne & Hunter*, agents for *Samuel Potter, Cheapside; E. & H. Tylee, Wickham, & Moberly.*

C. J. B.

1877

Jan. 15.

In re JACKSON. *Ex parte* HALL.

Bill of Sale—Registration—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt and Fresh Advance—Agreement not to register, but that new Bill of Sale should be given when required by Grantee—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36).

36 L.D. 104
36 C.D. 247
48.

A trader gave to one of his creditors a bill of sale of all his property to secure a then existing debt and a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantee filed a liquidation petition a new bill of sale was given, and was registered, and the grantee put a man in possession of the property. But the grantor's name remained on the premises as the ostensible occupier of them:—

Held, that, there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee in the liquidation.

Ex parte Cohen (1) and *Ex parte Stevens* (2) distinguished.

Statement.

THIS was an appeal from a decision of the Judge of the *Poole* County Court.

John Jackson was the proprietor of some billiard rooms at *Bournemouth*. Prior to the 16th of May, 1876, *W. J. Hall* had advanced him several sums of money, amounting in the whole to £45, of which there then remained due the sum of £39 15*s*. On the 16th of May he applied to *Hall* for a further loan, which *Hall* declined to make unless *Jackson* would give him some security for the existing debt, as well as the fresh advance. *Jackson* agreed to give a bill of sale of the furniture and effects belonging to him at the billiard room, which was in fact the whole of his property. He requested *Hall* not to register the bill of sale, and *Hall* promised that he would not, but *Jackson* promised that, if *Hall* should at any time require another bill of sale in place of the first, he would give it. The bill of sale was executed on the 29th of May, 1876, and by it *Jackson* assigned the property in question to *Hall* to secure the repayment of £60, *Hall* making him a fresh advance of £20 5*s*. This bill of sale was not registered. *Hall* afterwards applied to *Jackson* to execute another bill of sale of the same pro-

(1) Law Rep. 7 Ch. 20. (2) Law Rep. 20 Eq. 786.

C. J. B. 1877 *In re* JACKSON. *Ex parte* HALL.

perty, and *Jackson* did so on the 3rd of July, 1876. This bill of sale was registered on the 6th of July, 1876. On the 24th of July *Hall* put a man in possession of the property; *Jackson's* name, however, remained over the door of the billiard rooms. On the 27th of September *Jackson* filed a liquidation petition, under which, on the 14th of October, *H. Pratt* was appointed trustee. He applied to the County Court for an order to set aside the bill of sale as fraudulent against him.

Statement.

The Judge ordered it to be set aside.

Hall appealed.

Pollard, for the Appellant:—

Argument

The bill of sale is not an act of bankruptcy, for it was given in pursuance of the agreement entered into when the fresh advance was made: *Harris* v. *Rickett* (1); *Ex parte Fisher* (2); *Mercer* v. *Peterson* (3); *Lomax* v. *Buxton* (4).

Oswald, for the trustee:—

No fresh advance was made when the second bill of sale was given, and that is the bill of sale which has been set aside. The first bill of sale was void as against the trustee, because it was not registered. No possession was taken sufficient to satisfy the requirements of the *Bills of Sale Act*. The parol agreement cannot help the title of the Appellant: *Ex parte Cohen* (5); *Ex parte Stevens* (6).

BACON, C.J.:—

Judgment.

The argument on behalf of the Respondent is, that the execution of the bill of sale in July was an act of bankruptcy. Now the debtor owed his creditor £40, and he received from him a fresh advance of £20, and in consideration of that advance he gave the first bill of sale for the old and the new debts. That new advance was a sufficient equivalent. Then there was a stipulation that the bill of sale should not be registered, and that a new bill

(1) 4 H. & N. 1.
(2) Law Rep. 7 Ch. 636.
(3) Law Rep. 2 Ex. 304; Ibid. 3 Ex. 104.
(4) Law Rep. 6 C. P. 107.
(5) Ibid. 7 Ch. 20.
(6) Ibid. 20 Eq. 786.

C. J. B. 1877 *In re* JACKSON. *Ex parte* HALL. Judgment.

of sale should be given when the creditor required it. Was that an unlawful agreement? It bears no resemblance whatever to that which was done in *Ex parte Cohen* (1) and *Ex parte Stevens* (2) for the purpose of evading the wholesome provisions of the *Bills of Sale Act* by means of a connivance between the debtor and the creditor. The creditor could at any time have enforced the performance of the agreement to give a new bill of sale; he would have been entitled to have it specifically performed. It was a perfectly lawful agreement. Then, in July, the creditor did exercise his right, and the debtor readily complied. A new bill of sale was given in July, and it was duly registered. It was a perfectly valid bill of sale, and was not an act of bankruptcy. In the same month of July the creditor took possession of the property. There was no appearance of bankruptcy then, and when the bankruptcy did come the property was in the actual possession of the creditor under the provisions of the bill of sale. Unless the original bill of sale was an act of bankruptcy, or the second bill of sale was an act of bankruptcy, there can be no objection to the transaction. The cases cited are quite consistent with the conclusion to which I come, that the bill of sale of July is valid, because it was given in performance of the prior valid agreement. The order of the County Court must be discharged.

Solicitors for Appellant: *Lumley & Lumley.*

Solicitors for Respondent: *Neal & Philpot,* agents for *J. Robinson, Bournemouth.*

(1) Law Rep. 7 Ch. 20. (2) Law Rep. 20 Eq. 786.

In re PRYCE. *Ex parte* RENSBURG.

C. J. B. 1877 Jan. 29.

Reputed Ownership—Chose in Action—Debenture of Company—Indorsement in Blank—Equitable Assignment—Notice to Company—Debts due to Bankrupt in the Course of his Trade—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

A debenture of a joint-stock company, by which the company undertake to pay a sum of money, with interest, and charge their undertaking and property with the payment thereof, is a *chose in action* within the meaning of sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869.

An assignment of such a debenture by indorsement in blank confers a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy.

The words "debts due to the bankrupt in the course of his trade" in sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869, do not extend to all debts due to the bankrupt during the period of his trading, but include only debts connected with the trade.

Statement.

THIS was an appeal from a decision of one of the Judges of the *Liverpool* County Court.

Elijah Pryce was a merchant at *Liverpool*. *H. E. Rensburg* was a stockbroker. Prior to March, 1876, he had acted as broker for *Pryce*, and on the 1st of March *Pryce* owed him £100 4*s.* 2*d.* On that day he pressed *Pryce* for payment, and on the 3rd of March his cashier called at *Pryce's* office and asked for payment, and *Pryce* then handed over to him as security for the debt a debenture for £100 of a company called "*The Battle Mountain Mining Company, Nevada, United States, Limited.*" The debenture was in the following terms:—

"*The Battle Mountain Mining Company, Nevada, United States, Limited*, Office, 71, *Tower Buildings, Liverpool.*

"Mortgage Debenture for £100, interest at £15 per cent. per annum, repayable on the 31st of December, 1877.

"No. 4.

"The *Battle Mountain Mining Company, Nevada, United States, Limited*, in consideration of the sum of £100 paid to them by *Elijah Pryce*, of *Liverpool*, hereby undertake to pay the said *Elijah Pryce*, his executors, administrators, or assigns, on the 31st

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of December, 1877, the sum of £100, and also in the meantime interest thereon from the date hereof at the rate of £15 per cent. per annum, such interest to be paid by half-yearly payments on the 30th of June and the 31st of December in each year, the first of such payments to be made on the 30th of June next. And the said company do hereby charge the undertaking, mines, minerals, land, works, plant, property, and effects of the said company, and all sums of money arising therefrom, and all the estate and interest of the said company therein, with the payment of the said sum of £100, and of the interest to accrue and become due in respect thereof.

"Given under the common seal of the said company this 15th January, 1875."

(Signed) "*Robert Cochrane,* Secretary."

Before handing over the debenture *Pryce* indorsed it in blank. The company's articles of association contained no provisions as to the issue of debentures, but the company kept a register of the holders of their debentures, and no person could be registered as the holder of a debenture without the production of the debenture at the company's office.

On the 11th of March, 1876, *Pryce* committed an act of bankruptcy by absenting himself from his dwelling-house with intent to defeat his creditors. On the 15th of March *Rensburg* gave notice in writing to the company that the debenture had been assigned to him, and that he was the holder for value of it, and he requested the company not to pay any principal money or interest due or payable under the debenture to any one but himself. On the 20th of April a bankruptcy petition was presented against *Pryce,* and on the 25th of April he was adjudicated a bankrupt, the act of bankruptcy on which the adjudication was made being the absenting himself from his dwelling-house on the 15th of March. On the 11th of May *J. S. Banner* was appointed trustee in the bankruptcy. The trustee claimed the debenture, and applied to the County Court for an order that *Rensburg* should deliver it up. The facts above stated were embodied in a case agreed upon by the parties and submitted to the Court. The Judge was of opinion that the debenture was a *chose in action,* and, therefore, not within the reputed ownership clause. But he held that, the

company having no special powers under their articles of association or otherwise to issue debentures, the debenture could not be transferred by indorsement in blank, and that there was not a good equitable mortgage of it until notice had been given to the company, which was not done until after the act of bankruptcy had been committed. *Rensburg* was, therefore, never the true owner of the debenture, and the trustee was entitled to it.

Rensburg appealed.

Argument.

F. Thompson, for the Appellant:—

I contend that there was a good equitable mortgage of the debenture before the act of bankruptcy. As between the mortgagor and mortgagee notice to the company of the assignment was not necessary to complete the mortgagee's title: *Burn* v. *Carvalho* (1); *Rodick* v. *Gandell* (2). The bankrupt law does not affect the rights of the mortgagee, for the debenture is a *chose in action*, and, therefore, not within the reputed ownership clause: *Bankruptcy Act*, 1869, s. 15, sub-s. 5; *In re Northern Assam Tea Company* (3); *In re Natal Investment Company* (4). The fact that the undertaking or promise of the company to pay is followed by a charge of the debt upon their property makes no difference. Money charged on land is not within the reputed ownership clause: *Jones* v. *Gibbons* (5); and the same principle must apply to money charged on chattels in *America*. In *Ex parte Union Bank of Manchester* (6), it was held that shares in a joint stock company are not *choses in action* within the meaning of the reputed ownership clause. But shares are made assignable by statute; debentures were not assignable at law, and they are not subject to any statutory regulations as shares are. That case, therefore, does not apply.

Winslow, Q.C., and *W. H. Butler*, for the trustee:—

Ex parte Union Bank of Manchester is in point, for the title to the debenture depends upon the entry in the company's register. Moreover, there was not a valid equitable mortgage; there is no

(1) 4 My. & Cr. 690.
(2) 1 D. M. & G. 763.
(3) Law Rep. 10 Eq. 458.
(4) Law Rep. 3 Ch. 355.
(5) 9 Ves. 407.
(6) Law Rep. 12 Eq. 354.

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Argument.

authority for saying that a mere deposit of a bond or a promissory note will create a charge upon the debt secured by the bond or note. In *Burn* v. *Carvalho* (1) there was a written agreement to give a charge. And, if this debenture is a *chose in action*, then we contend that it is not excepted from the reputed ownership clause. Sect. 15, sub-sect. 5, excepts *choses in action* of a bankrupt "other than debts due to him in the course of his trade or business." This must be taken to mean debts due to the bankrupt during the period of his trading; for a trader contracts many debts which have no connection with his trade, such as debts due to his butcher and his baker, and yet his butcher or his baker can make him a bankrupt as a trader. In the same way, it was intended that all debts due to a trader during the period of his trading should be subject to the operation of the reputed ownership clause.

Judgment.

BACON, C.J.:—

The facts of this case are not in dispute. The creditor was urgent for the payment of his debt, and the debtor handed to him this debenture as security and indorsed it in blank. Can there be a doubt that if after this the creditor had desired to have a more formal assignment executed he would have had an equitable right to have the defect supplied? There can be no doubt that when this paper was so handed to him and indorsed the whole beneficial interest of the debtor in the debenture passed to him. Well, then, is this debenture a *chose in action?* There can be no doubt about it; it is that and nothing else. The money was advanced to the company upon what is in truth a promissory note, with an additional stipulation for a charge on all the property of the borrowers, but that does not make the instrument any the less a *chose in action.* As to the argument that, because the bankrupt was a trader, the debenture was a debt due to him in the course of his trade, I am unable to follow it. The result of it would be that every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The debenture has nothing whatever to do with the bankrupt's trade. The transaction was a plain and ordinary one, about which there can

(1) 4 My. & Cr. 690.

be no doubt whatever that it was an investment made by lending the money to the company. The debenture is a *chose in action*, and I am of opinion that the creditor is entitled to retain it. He was the true owner of it, and could prevent the bankrupt from making any use of it until he had paid his debt. The order cannot be sustained, and the appeal must be allowed with costs.

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Solicitors for Appellant: *Field, Roscoe, & Co.*, agents for *Bateson & Co., Liverpool.*

Solicitors for Trustee: *Layton & Jaques*, agents for *Radcliffe & Layton, Liverpool.*

In re DOWLING. *Ex parte* BANKS.

C. J. B. 1877 *Feb.* 12.

Undischarged Debtor—Property acquired—Earnings of Personal Labour—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

A liquidating debtor, who had carried on business as a painter, after he filed his petition, but before he had obtained any order of discharge, contracted to paint a yacht for the sum of £49. During the progress of the work he received £7 on account. The trustee claimed the balance of £42, and it was paid to him by the owner of the yacht. There was evidence that the £49 represented £15 for the debtor's personal labour, £15 for wages of workmen, £10 for cost of materials, and £9 for profit, and that the debtor borrowed money to pay the workmen and purchased the materials on credit. The County Court Judge ordered the trustee to pay the debtor £33 out of the £42:—

Held, on appeal, that the trustee was entitled to retain the whole of the £42.

Statement.

THIS was an appeal from a decision of the Judge of the *Portsmouth* County Court.

Henry Dowling, a painter at *Gosport*, filed a liquidation petition on the 23rd of April, 1872, under which, on the 10th of May, 1872, *H. W. Banks* was appointed trustee. Before he filed his petition, *Dowling* had sent in a tender for the execution of some painting and other repairs to a yacht called the *Galatea* belonging to a Mr. *Greg*. The amount of the tender was £49. On the 26th of April he was directed by *Greg* to execute the work, and he proceeded to do so. On the 18th of May *Greg* paid him £7 on account. The trustee claimed the £42 (the balance of the

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£49), and on the 8th of February, 1876, *Greg* paid it to him. At this time *Dowling* had not obtained an order of discharge. On the 19th of February, 1876, a writ was served on *Greg* in an action in the Queen's Bench Division brought against him by *Dowling* for the £42. The trustee applied to the County Court for an injunction to restrain the proceedings in this action; and the application was refused by the Judge of the County Court. The trustee appealed to the Chief Judge, who made an order restraining *Dowling* from taking any further proceedings in the action, and referred it to the County Court to decide as to the rights of the parties in respect of the £42.

The debtor made an affidavit, in which he stated that he employed several men to assist him in doing the work; that he obtained the necessary materials on credit; that he borrowed money to enable him to pay the men's wages; and that he did not use any materials out of the stock-in-trade which belonged to him when he filed his petition, as the trustee had taken possession of that. He also said that out of the £49 the value of his own labour was represented by £15, the wages of his men amounted to £15, and the cost of the materials to £10, leaving £9 for the net profit of the work. *Dowling* was also examined before the Judge, and in answer to questions by the trustee, he stated that he employed three men to assist him in the work, and paid them 3*s.* 6*d.* a day. The work was not finished till near the end of May. He was asked where he got the materials from, and he said, "from various friends;" and he added, "As I earned a few shillings I went and bought it, without the assistance of any one." In answer to questions put to him by his own counsel, *Dowling* said that he had none of the stock-in-trade belonging to his estate under the liquidation in his possession; that the materials used in the work were obtained from friends on credit, and that he paid the wages of his men by money which he borrowed. His counsel asked him, "Did you use the credit attached to you as a painter in business to get this contract? Did you, in short, represent that you were in business?"—*A.* "Of course I did." *Q.* "Did you represent that you were carrying on your business?"—*A.* "Yes." The Judge asked him: "Was the whole of the property obtained purely to support yourself and family, yourself working as a labouring

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man?"—*A.* "Yes." His counsel asked: "Did you represent that you were still in possession of your stock and credit?"—*A.* "No; I could not do that." *Q.* "Was the work merely journeyman's work?"—*A.* "It was."

The Judge ordered that out of the £42 which the trustee had received from *Greg* he should pay £33 to *Dowling*. The trustee appealed.

Argument.

Bagley, for the Appellant:—

An undischarged debtor is entitled to retain only that which is in the strictest sense the proceeds of his personal labour: *Wadling* v. *Oliphant* (1). The law was settled long ago in *Crofton* v. *Poole* (2), and has been ever since acted upon: *Elliot* v. *Clayton* (3). It is clear that this sum of £33 did not arise only from the debtor's personal labour. He was, in fact, carrying on his trade, and he admitted this in his examination. No previous case can be found in which an assignee in bankruptcy has been ordered to hand over to the bankrupt money which has come into his hands in this way.

Smalman Smith, for the debtor:—

The cases cited are distinguishable. In *Elliot* v. *Clayton* the bankrupt had some of his old stock-in-trade in his possession. Here the debtor got the materials on credit, and borrowed money to pay the wages of the labourers. He is liable for these sums, and the rest of the £49 (beyond the £9 which the trustee has got) represents only the earnings of the debtor's own labour. Work and labour and materials may be so blended together as to give rise to one cause of action: *Silk* v. *Osborn* (4). The present case is like *Williams* v. *Chambers* (5). The true test is, not simply whether the sum is the produce of the debtor's personal labour, but whether it is more than sufficient for the support of himself and his family.

Judgment.

BACON, C.J.:—

The law as laid down in *Crofton* v. *Poole* and *Elliot* v. *Clayton*

(1) 1 Q. B. D. 145.
(2) 1 B. & Ad. 568.
(3) 16 Q. B. 581.
(4) 1 Esp. 140.
(5) 10 Q. B. 337.

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is plain and distinct. After a man has become a bankrupt all the property which he acquires passes to his trustee until he has obtained his discharge, but there is an exception in favour of the earnings of his personal labour. That is the principle which I have to apply to the present case. This debtor, on the 26th of April, his petition having been filed on the 23rd, entered into a contract to paint a yacht. His business was that of a painter, and he himself in distinct terms says that in so doing he was carrying on his business. In performing the contract he found it necessary to employ labour and to buy materials. How does that differ from *Crofton* v. *Poole?* (1) That he assisted in the work himself it is reasonable to suppose. But the case is in substance the same as *Elliot* v. *Clayton* (2), where the bankrupt remained in possession of his stock-in-trade which had been bought by a friend. So here, the debtor, with the same means which he possessed before the liquidation, was carrying on the same business. That his friends assisted him can make no difference as to the rights of the trustee. If his rights depended, as is contended, upon the amount which is necessary for the maintenance of the debtor and his family, the rule would be one which varied with the extent of the debtor's family. That would be absurd. In accordance with numerous decisions, I must hold that this sum of £33 belongs to the trustee. The order is wrong, and the appeal must be allowed.

Solicitor for Trustee: *W. Stopher.*
Solicitor for Debtor: *F. Clift.*

(1) 1 B. & Ad. 568. (2) 16 Q. B. 581.

EAGLESFIELD *v.* MARQUIS OF LONDONDERRY.

C. A. 1875 M. R. Dec. 7, 8. C. A. 1876 Nov. 20, 21, 24.

[1874 E. 41.]

Railway Company—Misrepresentation by Directors and Secretary—Issue of Preference Stock under a false Description—Mutual Mistake of Law.

The *L. Railway Company* had power under its Acts to issue £100,000 preference shares and a large amount of ordinary shares. By an Act passed in 1864, it was amalgamated, together with other companies, with the *C. Company*, at which time it had issued £85,000 preference shares, which were to rank as No. 1 Preference Stock, and £60,000 ordinary shares, which were to rank as No. 2 Preference Stock, and power was reserved by the Act to the *C. Company* to raise any capital which any of the amalgamated companies had power to raise before the amalgamation. The directors, under a *bonâ fide* belief that they had power to raise the remaining £15,000 preference shares of the *L. Company*, and to make them rank with the £85,000 No. 1 Preference Stock, issued £15,000 preference stock, and described them in the certificates, which were signed by the directors and the secretary, as "No. 1 Preference Stock," and some of this stock was purchased by the Plaintiffs.

A scheme was filed in Chancery for arranging the affairs of the *C. Company*, and it was decided by the Court that the new stock was not No. 1 Preference Stock, but ranked below both it and No. 2 Preference Stock.

On a bill being filed by the Plaintiffs, alleging that they had been deceived by the form in which the stock had been issued and the certificates made, and praying that the company, the directors, and secretary might be held responsible for the misrepresentation :—

Held, by the Master of the Rolls, that the company, and also the directors and secretary, were liable to make good the misrepresentation to the Plaintiffs, and either to issue No. 1 Preference Stock to them or repay them their purchase-money.

But the Court of Appeal, being of opinion, on the result of the evidence, that the Plaintiffs did not suppose they were purchasing part of the £85,000 No. 1 Preference Stock, but a new stock which ranked with the No. 1 Preference Stock, *held* that the Plaintiffs had not been deceived by any misrepresentation of fact, but that there had been a common misconception of law, and they accordingly reversed the decree of the Master of the Rolls, and dismissed the bill with costs.

Affirmed by H. of L. W.N. (75) 98: 26 W.R. 540

Statement.

THE bill in this case was filed by *George Eaglesfield*, *William Harris*, and *Richard Jefferd Crook*, against the Marquis of *Londonderry*, and Messrs. *J. W. Johns*, *H. Gartside*, and *R. D. Pryce*, directors of the *Cambrian Railways Company*, and against the *Cambrian Railways Company* and their secretary, *G. Lewis*, for the purpose of making the Defendants liable for losses alleged to be sustained by the Plaintiffs by the misrepresentations of the Defendants.

C. A.
1876
EAGLESFIELD v. MARQUIS OF LONDONDERRY.
Statement.

By Acts passed in 1853, 1859, 1861, and 1862, the *Llanidloes and Newtown Railway Company* was authorized to raise a capital of £110,000 in shares, of which £50,000 was to carry a preferential dividend of £5 per cent. This amount of preference shares was accordingly issued.

By the *Mid-Wales Railway Act*, 1859, and the *Mid-Wales Railway (Extension) Act*, 1860, the *Llanidloes Company* was authorized to subscribe £50,000 to the capital of the *Mid-Wales Railway Company*, and to raise that amount by creation of shares in the *Llanidloes Company*, of which £25,000 might carry a preferential dividend of £5 per cent.

Under these powers £10,000 preference shares only of the £25,000 were issued.

By the *Llanidloes and Newtown Railway Act*, 1864, the above-stated provisions of the two last-mentioned Acts were repealed, but it was provided that the repeal was not to invalidate the acts of the company in raising the £10,000 or the power of the company to raise the residue of the £25,000.

By the *Aberystwith and Welsh Coast Railway Act*, 1861, the *Llanidloes Company* was empowered to subscribe £25,000 towards the *Aberystwith and Welsh Coast Railway Company*, and to raise the amount by £5 per cent. preference shares, and preference shares to that amount were shortly afterwards issued.

By the *Cambrian Railways Act*, 1864, the *Llanidloes* and three other companies were consolidated into one company, called the *Cambrian Railways Company*, with a present capital of £275,000.

Sect. 15 of that Act contained a tabulated classification of the shares and preferential stocks which comprised the present capital of the new company, containing, among others, the following items:—

Name and Class of Capital.	Amount per cent. per annum of Preferential Dividends.	Amount of Stock or Shares.
	£	£
Llanidloes No. 1 Preference Capital . .	5	85,000
Llanidloes No. 2 Preference Capital, representing *Llanidloes* and *Newtown* ordinary capital	5	60,000

By sect. 29 the *Cambrian Railways Company* were empowered to raise, as therein provided, such additional capital as they might think fit, not exceeding in the whole £30,000, and also to raise any capital which any of the dissolved companies at the time of the passing of the Act had power to raise by the creation of shares or stock and had not raised, and also any capital which by any Act or Acts of the then present session the dissolved companies, or any of them, were before or after the passing of the Acts authorized to raise in like manner as the dissolved companies were or might respectively be empowered or authorized to raise the same.

On the 24th of February, 1865, a special general meeting of the *Cambrian Railways Company* was held, and a resolution passed by which the company purported to create and issue, under the powers reserved by the *Cambrian Railways Act*, 1864, the sum of £15,000 additional capital, being the residue which had not been raised of the £25,000 preference capital which by the *Mid-Wales Railway (Extension) Act*, 1860, the *Llanidloes Company* was authorized to raise.

The Defendant directors were all present at this meeting.

In March, 1865, the whole of this £15,000 new preference stock was issued by the directors to Mr. *T. Savin*, in part satisfaction of a debt due to him from the company.

The directors and the company acted under the impression that the new stock would rank *pari passu* with the sum of £10,000 previously raised under the powers of the *Mid-Wales Railway (Extension) Act*, 1860, and the other stock included in the £85,000 *Llanidloes* No. 1 Preference Capital. The certificates or coupons issued to Mr. *Savin* described it as "*Llanidloes* No. 1 £5 per Cent. Preference Stock issued under the *Mid-Wales Railway (Extension) Act*, 1860." These coupons were signed by two of the directors of the company, and countersigned by the secretary, Mr. *Lewis*.

In October, 1865, the Plaintiffs, acting through Mr. *Eaglesfield*, entered into an agreement with Mr. *Savin* that, in consideration of their transferring to him £10,000 debentures of the *Neath and Brecon Railway Company*, he should transfer to them £10,000 No. 1 *Llanidloes* Preference Stock.

Accordingly, on the 14th of October, 1865, *Savin* executed a

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transfer to the Plaintiffs of "£10,000 £5 per Centum Preference Stock *Llanidloes* No. 1 (Act, 1860) of and in the undertaking called the *Cambrian Railways Company*." In the margin of this transfer was a memorandum, written by the secretary, as follows: "Coupons for £10,000 Preference 1860 Stock forwarded to the company's office by Mr. *Savin* are held by me to meet this transfer."

The Plaintiffs executed the transfer, and ten new certificates for £1000 each were issued by the company to the Plaintiffs. Each of these certificates was headed "No. 1 *Cambrian Railways Company*, Register No. —, *Llanidloes* No. 1 5 per Cent. Preference Stock, issued under the *Mid-Wales Railway* (*Extension*) *Act*, 1860," and certified that the Plaintiffs were registered as the proprietors of £1000. The certificates were signed by two directors, and countersigned by the secretary.

In March, 1866, the Plaintiffs received a dividend at the rate of £5 per cent. on their stock, which was described in the counterfoil of the warrant as "*Llanidloes* No. 1."

In the year 1868, the *Cambrian Company* being in embarrassed circumstances, an Act was passed for the arrangement of their affairs, and in 1870 the company presented under that Act a petition to the Court of Chancery, asking for a declaration of the rights of the shareholders; and Vice Chancellor *James* then decided that, according to the true construction of the Acts of 1864, the holders of the £15,000 preference stock, which was issued under the *Cambrian Railways Act* of 1864, were not entitled to rank as holders of *Llanidloes* No. 1 or No. 2 Preference Stock, but only as holders of a stock subject to the prior preference in favour of those two stocks.

In 1871, a scheme of arrangement of the affairs of the company was sanctioned by Vice-Chancellor *Bacon* under the provisions of the *Railway Companies Act*, 1867, and in July, 1873, the Plaintiffs presented a petition under the *Cambrian Railways Act*, 1868, asking that the list of the holders of No. 1 Preference Stock might be settled. An order to that effect was made by Vice-Chancellor *Bacon*, and the Plaintiffs were declared not to be entitled to any of that stock. They accordingly filed this bill, alleging that they agreed to purchase, and supposed they had purchased, of Mr. *Savin* "some of that portion of the company's stock which was, in sect.

15 of the *Cambrian Railways Act*, 1864, designated *Llanidloes* No. 1 Preference Capital, and which was thereinafter designated *Llanidloes* No. 1 Stock," and that they had been deceived by the form of the certificates issued by the company and signed by the secretary, which contained a misrepresentation of the nature of the stock; and they prayed that the Defendants might be declared jointly and severally liable to make good to the Plaintiffs £10,000 *Llanidloes* No. 1 Preference Stock, or to pay them the value of the £10,000 *Neath and Brecon* debentures at the date of transfer, with interest.

The Plaintiff *Eaglesfield* filed an affidavit in support of the bill, which contained the following statements respecting the alleged misrepresentation and the time when he discovered it. He stated (paragraphs 2 and 3) that he had previously held £5700 stock of *Llanidloes* No. 2 Preference Stock, but had had no other dealings in the company's stock, and that he knew that the stocks No. 1 and No. 2 amounted to £85,000 and £60,000 respectively, and that they were of greater value than the 1864 stock, but he did not know how the £85,000 No. 1 Stock was made up.

In paragraph 4, he said, "I have since become aware, in the course of legal proceedings instituted by me, that the £85,000 was the aggregate of certain preference capital under various Acts of Parliament, but that I never knew with certainty until the certificate was given by Vice-Chancellor *Bacon* that the £10,000 stock purporting to be *Llanidloes* No. 1 Preference Stock which I purchased was not genuine stock of that class."

In paragraph 7, after setting out a letter written by Mr. *Fraser*, Mr. *Savin's* partner, offering him £10,000 *Llanidloes* No. 2 Preference Stock, he said, "In consequence of such last-mentioned letter, I shortly afterwards called on Mr. *Fraser* at Mr. *Savin's* office. At the interview he spoke to me of the 1864 stock, and recommended it to me, but I told him that I declined to invest in that stock, and, moreover, that I would not make any further investments in the No. 2 Stock above mentioned. I also told him that I was a trustee, and should not invest in any stock other than *Llanidloes* No. 1 guaranteed, and I finally agreed with him at that interview for the purchase of £10,000 of the *Llanidloes* No. 1 5 per Cent. Preference Stock."

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In paragraph 14. "As hereinbefore stated, I had no knowledge until the making of the certificate by Vice-Chancellor *Bacon* that the £10,000 stock so purchased by me as aforesaid was not genuine No. 1 *Llanidloes* Preference Stock; but in or about the year 1869 some doubt was thrown on its genuineness by Mr. *Howell*, the then secretary of the *Cambrian Company*. He, in a letter dated the 11th of June, 1869, addressed to our solicitor, says: 'We are afraid, and are very sorry for it, that Mr. *Eaglesfield* holds a portion of *Llanidloes* Stock 1864.' The suggestion contained in the letter, however, and subsequent assertions to the same effect, were not sufficient, in the face of our documents, to raise any serious doubt in my mind as to the genuineness of our stock."

In paragraph 16, after stating the filing of the petition by the Plaintiffs under the *Cambrian Railways Act*, 1868, in July, 1873, he said: "By means of the order made upon that petition, and the list of holders of No. 1 Preference Stock which was settled by Vice-Chancellor *Bacon* in Chambers, and the certificate made in pursuance of such order, it was for the first time ascertained that I and my co-Plaintiffs were not, in fact, holders of any *Llanidloes* No. 1 Preference Stock, and that the said *T. Savin* was not at the time of the transfer to us, in October, 1865, the holder of any such stock."

In paragraph 21, he said: "Under the circumstances hereinbefore detailed, I and my co-Plaintiffs were for several years kept in complete ignorance of our having been deceived as hereinbefore appears as to the kind and character of the stock so purchased by us as aforesaid, and it was not until some time in or shortly after the year 1869 that we had a suspicion of or a reason to suspect the existence of that deception. The existence of it was finally established by means of the proceedings hereinbefore mentioned under our petition to His Honour Vice-Chancellor *Bacon* under the *Cambrian Railways Act*, 1864, and not before."

In his affidavit in reply, Mr. *Eaglesfield* stated that he was at the time of the transfer acquainted with the distinction between the No. 1 Preference Stock, the No. 2 Preference Stock, and the New Preference Stock of 1864.

The other Plaintiffs had no personal knowledge of the transaction.

The Defendants said that they considered, and had been so advised by the solicitor of the company, who settled the form of the certificates, that the £15,000 new stock would rank with the £85,000 No. 1 Preference Stock in the same way as the £10,000 previously issued under the *Mid-Wales Railway (Extension) Act*, 1860, did; and they denied all intention to deceive the Plaintiffs.

The cause was heard before the Master of the Rolls on the 7th and 8th of December, 1875.

Argument.

Southgate, Q.C., *Davey*, Q.C., and *Phear*, for the Plaintiffs:—

The Defendants in this case are jointly and severally liable to make good to the Plaintiffs the loss which they have sustained by reason of the representation contained in the certificate that the stock which they purchased was *Llanidloes* £5 per Cent. Preference Stock. This proved to be a false representation, and, although it may have been made *bonâ fide*, and not with an intention to deceive, yet the directors were bound to take proper steps to satisfy themselves of the correctness of their representation, and cannot escape from the liability they have thus brought upon themselves: *In re Bahia and San Francisco Railway Company* (1); *Burrowes* v. *Lock* (2); *Slim* v. *Croucher* (3); *Reese River Silver Mining Company* v. *Smith* (4); *Peek* v. *Gurney* (5); *Ship* v. *Crosskill* (6); *Swift* v. *Winterbotham* (7); *Pickard* v. *Sears* (8); *Freeman* v. *Cooke* (9).

Sir *J. Holker*, A.G., *Marten*, Q.C., and *Cracknall*, for the directors:—

The directors in this case have incurred no liability whatever. There was, according to our contention, no misrepresentation at all. If the several Acts of Parliament, namely, the *Mid-Wales Railway Extension Act*, 1860, the *Llanidloes and Newtown Railway Act*, 1864, and the *Cambrian Railways Act*, 1864, are properly construed, the £10,000 stock in question was in fact part of the *Llanidloes* No. 1 Preference Stock.

(1) Law Rep. 3 Q. B. 584.
(2) 10 Ves. 470.
(3) 1 D. F. & J. 518.
(4) Law Rep. 4 H. L. 64.
(5) Law Rep. 6 H. L. 377.
(6) Ibid. 10 Eq. 73.
(7) Ibid. 8 Q. B. 244.
(8) 6 A. & E. 469.
(9) 2 Ex. 654.

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But, assuming that the stock was not No. 1 Preference Stock, but ranked below it, even then it was misrepresentation not of fact but of law. The directors were advised by their solicitor that the stock was of the class which it purported to be, and though they may have been wrongly advised, and have been led to put an erroneous construction upon these Acts, they cannot on that account be held liable as if they had made a misstatement of fact: *Beattie* v. *Lord Ebury* (1).

Further, we contend that, assuming there was misrepresentation of fact as well as law, unless it can be shewn that the Plaintiffs acted upon it they are not entitled to recover. Now, the Plaintiffs were not deceived at all; they do not allege that in the purchase of this stock they acted on any representation of the directors: on that ground, therefore, their case fails.

The directors in this matter, even if they were mistaken, acted *bonâ fide*, and under the advice of their own solicitor. No case of wilful misrepresentation is made out against them. They would not be liable in an action of deceit, and cannot be made liable by this Court: *Swift* v. *Jewsbury* (2); *Rashdall* v. *Ford* (3).

Fry, Q.C., and *Speed*, for the *Cambrian Railways Company*, and for the Defendant, *George Lewis*, the solicitor to the company.

Judgment, M.R. JESSEL, M.R.:—

The material facts of this case are certainly few in number, and I think the law on the subject is fairly settled.

The case presented by the Plaintiffs is one of the simplest possible. They say, "We wanted to buy some preference shares of the *Cambrian Railways Company* called *Llanidloes* No. 1 Preference. They were the first preference shares on that portion of the *Cambrian* system which consisted of a railway formerly called the *Llanidloes Railway*, and there were such preference shares in existence. Mr. *Savin* said he would sell to us £10,000 of such stock, and handed to us a transfer of £10,000 No. 1 Preference Stock *Llanidloes*, which on its face bore the usual certificate (although it differs in a word or two) of the secretary of the railway company,

(1) Law Rep. 7 H. L. 102. (2) Law Rep. 9 Q. B. 301.
(3) Law Rep. 2 Eq. 750.

that the stock coupons had been duly deposited with him by the vendor, and were in the office. On the faith of that transfer we paid for the shares so purporting to be transferred, giving to Mr. *Savin* a transfer of some debentures of another company, so that it was money or money's worth to Mr. *Savin;* the transfer was completed at the office, and the usual certificates were sent to us stating that we were the owners of *Llanidloes* No. 1 Preference, and we received a dividend. But some time afterwards it was discovered that the stock sold to us was not *Llanidloes* No. 1 Preference Stock at all, but No. 3, and that there were two other stocks before it, so that instead of being worth *par* it is worth little or nothing. The persons who were the cause of our loss may be divided into three sets, using the word "person" to include the company. There was, first of all, Mr. *Savin,* the vendor, who represented to us that it was *Llanidloes* No. 1 Preference Stock, when it was not; secondly, the directors, who issued to Mr. *Savin* coupons or certificates that the stock in question was *Llanidloes* No. 1 Preference, when it was not; and thirdly, there was the company who authorized the directors."

I think it only necessary to state the main objections, and to give the answer to them. The Attorney-General said, first, there was no misdescription at all: this stock was in fact No. 1 Preference Stock. That was the most important point, because if Mr. *Eaglesfield,* who acted for his co-Plaintiffs, got what he bargained for, he has nothing to complain of. There was a preliminary difficulty in the Attorney-General's way, which was this, that Vice-Chancellor *James* had decided that the stock in question was not No. 1 but No. 3 Preference Stock; and a decision which, as the decision of a Judge of co-ordinate jurisdiction, I should follow without question, unless it were either opposed to the general current of authority, or against the plain meaning of an Act of Parliament. I have gone through the Act, and I am not only satisfied that the decision of Vice-Chancellor *James* was correct, but also, I think it a very plain case, and that a little attention on the part of the directors and their solicitor would have led them to the same conclusion. It does not follow that the solicitor was to blame for having made this mistake.

[His Lordship then stated his view of the construction of the

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Mid-Wales Railway (Extension) Act, 1860, the *Llanidloes and Newtown Railway Act*, 1864, and the *Cambrian Railways Act*, 1864, with reference to the question in the suit, and held that the £10,000 stock was not *Llanidloes* No. 1 Preference Stock, but that it was at the best No. 3 Preference, though in reality it ranked below all the preference stocks mentioned in the *Cambrian Railways Act*, 1864, which were prior charges on the separate portions of the *Cambrian Railway* system, and on its general revenue. His Lordship continued :—]

The misrepresentation is contained in the certificate of proprietorship which two of the directors signed. I am glad the board do not attempt to throw the blame on the two directors who did sign it, but say they all authorized it. The certificate is a certificate that *Savin* is the proprietor of £10,000 of the *Llanidloes* No. 1 £5 per Cent. Preference Stock issued under the *Mid-Wales (Extension) Railway Act*, 1860.

It was put to me that this was a misrepresentation of law and not of fact. It was said the company and the directors did not know their Acts of Parliament, and their solicitor had told them this, which they believed, that the new £15,000 Preference Stock would be and be treated as part of the *Llanidloes* No. 1 Preference Capital, and rank and stand upon the same footing in all respects as the £85,000 *Llanidloes* No. 1 Preference Stock.

Of course, solicitors can give wrong advice as well as other people, and I have no doubt he did think that this would rank as part of the *Llanidloes* No. 1 Preference Stock. But does that make it a misrepresentation of law? A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, "You may, she is a single woman of large fortune." It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it

had not been declared so by any Court, and it afterwards turned out they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, "Now, you see, the lady is single," that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.

There is not a single fact connected with personal *status* that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas.

It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowlege of law. To state that a man is entitled to £10,000 Consols involves all sorts of law. Therefore this is a statement of fact, and nothing more; and I hold the argument to be wholly unfounded which maintained that it was a statement of law.

The next point was, that, if it were a misrepresentation of fact, Mr. *Eaglesfield* did not act, and does not say he acted, on the misrepresentation. Here, again, I think the argument void of foundation. The document in question, the coupon or certificate, is the only evidence of title which the vendor of railway stock has. If he goes to sell his stock, it is the only thing he can hand to his broker. The purchaser has no right to inspect the share register, which is the other evidence of title, and in practice he cannot inspect it. I add the words "in practice," because in the similar case of court rolls, the purchaser can in practice inspect if the steward will allow him. The purchaser of railway [stock

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cannot satisfy himself of the vendor's title by anything more than this, that the vendor has the certificates, and those certificates are lodged at the office, so that the secretary has notice that the certificates are so lodged for the purpose of meeting the transfer. With the transfer, the purchaser has got all he can obtain, and all he does obtain in practice, and he hands over his valuable consideration in exchange for the transfer, and the notice that the certificates are lodged. The very thing for which he gives his money is not merely a transfer, but a transfer *plus* certificates or coupons duly lodged. To say he does not act on the certificate is to say the whole transaction is to go for nothing. You might as well say that a man who buys land, and has an abstract of title furnished to him, does not act on the abstract after he has accepted the title and taken the conveyance. It is the very foundation of the transaction; and it appears to me it was not necessary for Mr. *Eaglesfield* to swear to any such thing.

The next point is this: It was said that, at all events, the directors are not liable if they *bonâ fide* believed the correctness of the representation. That they *bonâ fide* believed it, and were entitled to believe it, it is reasonable to believe. They are acting on the advice of their confidental solicitor. It may well be that an action of deceit could not be maintained against them. But that is not the point. The point is, whether they are liable in this Court. Let us first look at the thing independently of the decisions.

Persons state a material fact to induce another person to act, and they state it untruly. They are careless, and being ignorant, they are ill-advised; but they do state the material fact untruly, on which the other person acts. It is intended that that other persons shall act on it. The certificate is given to Mr. *Savin* to enable him to transfer his shares and sell them in the market. The object is, that he shall induce some other person to act on it. Is it in a civil Court to be said, that the man who either through carelessness or negligence so misleads another as to induce him to part with valuable property, is not to be liable? Is he not to be liable, because he was misled by the advice of his solicitor? In all transactions in which men are liable they must choose their agents, whether legal or otherwise; and, having chosen them, they are responsible for their acts.

The whole doctrine of equity depends on this. There is no more reason for excusing the man who acts on the advice of his solicitor in this way than there is for excusing the man who defends an action on the advice of his solicitor, and loses it, from paying the costs. Even in a criminal Court it is no defence. If a man is indicted for obstructing a highway, he will not the less be found guilty because his solicitor advised him it was not a highway, and had never been dedicated to the public. Nor in any other case could it be alleged that a man is not to be held responsible for acting on advice which may have been given *bonâ fide*, but is not sound.

Again, in a civil Court, what is it to the person defrauded that the person who made the false statement did not take sufficient care? If there are facts on which advice is wanted, or which raise a doubt, the directors should have put the substance of the resolution on the certificate, and then the purchaser would take the responsibility of seeing whether the legal result did or did not follow from the real facts of the case. There was no compulsion on the directors to make a statement that there was stock of such a date; and I see no reasonable ground for exempting them from the consequences of a voluntary statement which turns out to be untrue, and has misled another person.

It appears to me, therefore, on the reason of the thing, that even if there were no authority, the directors ought to be held liable. But there is a great deal of authority on the subject. Take the well-known case of *Burrowes* v. *Lock* (1). The utmost that can be made of that case was that the trustee had forgotten an incumbrancer's notice of a title to stock. But suppose you carry it a step further, and shew that the trustee had had actual notice of an assignment, but his solicitor had told him that the assignment was invalid for want of a seal on the deed, and consequently he did not say a word about it. He would be in a worse position as regards argument, for it would be said, Why did you not say you had notice of a thing called an assignment, and then you would have been safe; why did you take on yourself to decide the thing in this way? It appears to me, therefore, that the present case is stronger than *Burrowes* v. *Lock*.

(1) 10 Ves. 470.

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Again, in the case of *Slim* v. *Croucher* (1), the man had simply forgotten what he had done. Would he have been better off if, instead of forgetting that the lease had been granted, he had remembered the fact, but had been told by his solicitor that it was void, and therefore omitted to mention it? Again, in *Peek* v. *Gurney* (2), Lord *Cairns* says: "My Lords, we were pressed very much in argument with considerations as to the motives of those who made this statement, and it was pointed out with great accuracy that upon a trial in the nature of a criminal proceeding it had been held that they" (that is, the directors of *Overend & Gurney*) "were not chargeable with that which was laid to their charge."—I may mention this, that it was a criminal proceeding in which the alleged guilty intent was part of the crime.—"My Lords, I must say that, so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding; and, strange as it may appear, I think there is a great deal in the papers before your Lordships to shew that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, labouring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking; and so far as motive is concerned they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your Lordships will be obliged to arrive at the consequences which probably would result from what was done."

In another case of *Reese River Silver Mining Company* v. *Smith* (3) Lord *Cairns* says: "When I say 'a fraud,' I do not enter into any question with regard to the imputation of what may be called 'fraud' in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons

(1) 1 D. F. & J. 518. (2) Law Rep. 6 H. L. 409.
(3) Law Rep. 4 H. L. 79.

take upon themselves to make assertions as to which they are ignorant, whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue."

Here the Defendants say, and say with truth, that what they did they did on the advice of their solicitor. I am not going to say a word that will annoy them, or injure them as regards their position in the world as honourable and honest men. I have no doubt that, as they say, they were ignorant, and did what they did on the advice of their solicitor, and with no intention to deceive or defraud anybody. But I must nevertheless hold them responsible to the same extent as if they had actually known that what they were stating was really, as it was in fact, untrue.

Then it was said that Mr. *Eaglesfield* was not aware of the misdescription. It was said by the secretary that Mr. *Eaglesfield* had the Railway Acts in his possession, and could have found out for himself, and must have known that the stock was not issued until 1864. All I say is, that he could not have found it out from the *Cambrian Railways Act*, 1864. That Act did not tell him about any of these distinctive marks; it shewed him that there was £10,000 stock issued under the *Mid-Wales Railway (Extension) Act*, 1860, and nothing more. The register itself, if he could have got to it, which he could not, would not have told him anything more. The register described it as *Llanidloes* No. 1 Preference Stock under the *Mid-Wales Railway (Extension) Act*, 1860. Up to June, 1865, it was described as *Llanidloes* Preference Balance under *Mid-Wales Railway (Extension) Act*, 1860, which was more really accurate; but the actual entry at the time of Mr. *Eaglesfield's* purchase was as I have stated, and would, standing alone, have induced anybody to believe it was the very £10,000 stock created under the original resolution.

That disposes of all that I can call the substantial argument on the part of the directors. It appears to me, as far as they are concerned, that argument ought not to relieve them from liability to make good the representation.

The same observations apply to the secretary. I should have been willing, with the consent of the Plaintiffs, to have dismissed the bill as against him without costs on account of his subordinate

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position; but as they do not consent, the decree must go against him.

The only other Defendant is the company. I have listened to a very ingenious argument from the learned counsel who appeared for the company. The ordinary rule is plain. An agent acting within the scope of his authority, whether special or general, makes his principal liable, and not the less liable because the agent himself may be liable.

Take this illustration: A coachman who, by his negligence in driving his master's carriage, runs over a child, is liable to an action at the suit of the child, and the master is also liable. I apprehend that under the new practice they might be joined as Defendants. Of course the coachman is not usually sued, because he is not worth suing; but if he came into a fortune, and became a Defendant good for costs and damages, there is no reason why he should not be sued. But it does not follow that because he is liable the principal is not. The principal is still liable if the act was done in the ordinary course of the agent's employment.

There will be a declaration that the Defendants are jointly and severally liable to make good to the Plaintiffs their representations, or, if they are unable to do so, to place the Plaintiffs as far as possible in the same position as they would have been in if the representations had not been made.

C. A.

From this decision the Defendants, the directors, appealed. The appeal was heard on the 20th, 21st, and 24th of November, 1876.

Cotton, Q.C., *Marten*, Q.C., and *Cracknall*, appeared for the Appellants.

Fry, Q.C., and *Speed*, for the company and the secretary.

Southgate, Q.C., *Davey*, Q.C., and *Phear*, for the Plaintiffs.

The view taken of the case by the Court renders it unnecessary to state the arguments as to the liability of the directors or the company for the alleged misrepresentation. The same line of argument was pursued as at the hearing before the Master of the Rolls.

In addition to the cases then cited, the following were referred to: *Hart* v. *Frontino Gold Mining Company* (1); *Henderson* v. *Lacon* (2); *Scott* v. *Dixon* (3); *Barry* v. *Croskey* (4); *Mackay* v. *Commercial Bank of New Brunswick* (5); *New Brunswick Railway Company* v. *Conybeare* (6); *Haycraft* v. *Creasy* (7); *Ormrod* v. *Huth* (8); *Stephens* v. *De Medina* (9); *Western Bank of Scotland* v. *Addie* (10); *Barwick* v. *English Joint Stock Bank* (11).

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion in this case that the order of the Master of the Rolls cannot be affirmed.

The Plaintiff, Mr. *Eaglesfield*, alleges that the Defendants, the directors and the secretary, made a misrepresentation to him, and that he was deceived by that misrepresentation of the Defendants. Now it is not necessary, in the view which the Court takes of the case, that we should distinguish between the respective liabilities of the secretary and of the directors and of the company, or go into any examination, which would be otherwise necessary, of the extent to which the misrepresentation, if misrepresentation there be, is brought home effectually so as to be accompanied with legal consequences to the company, to the directors or to any of them, or to the secretary. But there is a part of the case that is common to all which lies at the root of the Plaintiff's contention in this matter, which is, that there was a misrepresentation made to him, and that he was deceived by means of that misrepresentation. Of course the misrepresentation, if misrepresentation there be, must be a misrepresentation of a matter of fact, and not a misrepresentation in terms applicable to a matter of law, as to the legal consequences of the true facts. Now, as between the Plaintiff and the company, up to and at the time of the completion of his transaction with *Savin*, the only thing brought home to the company, the directors or the secretary, is this: *Savin* being the

(1) Law Rep. 5 Ex. 111.
(2) Ibid. 5 Eq. 249.
(3) 29 L. J. (Ex.) 62, n.
(4) 2 J. & H. 1.
(5) Law Rep. 5 P. C. 394.
(6) 9 H. L. C. 711.
(7) 2 East, 92.
(8) 14 M. & W. 651.
(9) 4 Q. B. 422.
(10) Law Rep. 1 H. L., Sc. 145.
(11) Law Rep. 2 Ex. 259.

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possessor of certain stock in the Defendant company, as to which *Savin* at that time had no certificates at all, and as to which certain certificates were issued, but which certificates had never been shewn to, or read to, or in any way communicated as certificates to the Plaintiff—*Savin* sells some stock to the Plaintiff, and a transfer is sent to the company as a transfer of "£10,000 (say ten thousand pounds) of 5 per Cent. Preference Stock *Llanidloes* No. 1 Act, 1860;" that being the description in the body of the certificate; and then there is written across that, "Coupons for £10,000 (Preference 1860 Stock), forwarded to the company's office by Mr. *Savin*, are held by me to meet this transfer." That was the whole representation which was directly or indirectly made by anybody on behalf of the company to Mr. *Eaglesfield*, and the only thing by which he could possibly have been misled. It is suggested he was misled before he completed the transaction as between him and *Savin*.

Now, the facts are these: There was a certain sum of £85,000 No. 1 Preference Stock, referred to in the Act of 1864, sect. 15, that is the *Cambrian Railways Act*. That same Act had reserved, upon the amalgamation of all the existing lines into the new aggregate, the power of issuing all the stocks, preference and otherwise, which had not been previously issued by the dissolved companies themselves under the powers of their Acts, and, among others, there was a power in the Act of 1860 unexhausted, to issue £25,000, of which £10,000 had been issued, and £15,000 still remained to be issued. With regard to that the *Cambrian Railways Company* took upon themselves to issue the remaining £15,000, and the directors say (and there is no reason to doubt what they say) that they were advised that the unissued preference stock of the *Llanidloes Railway* (which was originally upon the same footing as that which had been issued, that is to say, the £10,000) could still be issued as having the same preference as the £10,000, and therefore that it was entitled to be No. 1 Preference Stock of that line. They say they were so advised, and they say, further, that they were advised by their solicitor that the proper mode of describing that stock was "*Llanidloes* No. 1, 5 per Cent. Preference Stock issued under the *Mid-Wales Railway Extension*, 1860." They acted upon that. Well, then, what came back to

the secretary was a statement that *Savin* had sold to the Plaintiffs £10,000 5 per Cent. Preference Stock No. 1 Act, 1860, and the secretary sends back to the person who sent him in that transfer the receipt, thus: "Coupons for £10,000 Preference 1860 Stock, forwarded to this company by Mr. *Savin*, are now held by me to meet this transfer." The secretary was not making any representation beyond meaning it to apply to the stock of £15,000 which had been issued by the *Cambrian Railways Company*. The Defendants swear that they never had the slightest intention of making any misrepresentation, and that when they issued the certificate to *Savin*, which the Plaintiff has nothing to do with, except so far as the substance is given in this document, and the extent to which it is given, they believed they were giving that which they honestly and fairly might give, as distinguishing the new stock of £15,000 which they had issued.

Now, in order to maintain the case of misrepresentation against them, it appears to me that the representation must be wilful and fraudulent. Whether the fraud is supposed to be a fraud in this Court as distinguished from moral fraud or not, there must be a wilful and fraudulent statement of that which is false to maintain an action of deceit. It is very difficult to say that directors who acted in this way had any intention to deceive.

But then what appears to me conclusive of this matter is, that the Plaintiff himself has not suggested that he was in the slightest degree misled by that which he alleges now to have been a misrepresentation. He was dealing with *Savin*, and to what extent he knew the stock was stock which *Savin* was getting as contractor, I do not know, and it is not very material, but his contention is that he was told in substance that he was getting part of the £85,000 stock which was mentioned in a particular section of that Act, and that he did not get it. Now, he never in so many words pretends that he did believe he was getting part of the £85,000 stock. He does not say that he was deceived by the company telling him he was getting part of the £85,000, or that anybody told him so. He says, he thought he was getting "genuine No. 1 Stock," that is to say that he was getting stock which he believed from the documents furnished to him would rank with and be for all practical purposes genuine No. 1 Stock. If his contention were true

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(which of course was a desperate one), that they did in fact rank as No. 1 Stock, then he was getting No. 1 genuine Preference Stock of the *Llanidloes Railway*. The secretary of the Defendant company, Mr. *Lewis*, in his affidavit, having referred to the sort of argumentative statement of deception which the Plaintiff put forward in his first affidavit, says this: "I believe that no deception was practised on him by any person whatever, but that, on the contrary, he knew the nature of the stock he purchased of Mr. *Savin*." He does not in any way controvert that; the only way in which he meets that which goes to the very root of his case is this: "With reference to paragraph 20 of the affidavit of *George Lewis*, I repeat that I did not, when I purchased and took a transfer of the £10,000 stock to which this suit relates, know or suspect that it was anything but genuine No. 1 Stock." Now, if he had been told every word that had passed—if the whole resolution of the company had been read to him, and the form of the certificate and everything that occurred in the case had been known to him, he could still have sworn with most perfect truthfulness that he did not know or suspect that it was "anything but genuine No. 1 Stock." Of course he believed then, and for long afterwards, that notwithstanding the circumstances under which it was issued, it was genuine No. 1 Stock; that is to say, stock that would have a preference and would take rank as being entitled to the first dividend. The meaning of "No. 1 Preference Stock" is that it is entitled to the first dividend, and if he had been told so by *Savin*, *Savin* falling into the same mistake as the directors had fallen into, he could still have sworn with perfect truth that he never knew or suspected that it was anything but genuine stock. In my opinion that is very far from making out the case that there was any deception practised upon him, or that he was deceived, or that there was any representation made to him by which he was deceived.

Then another thing is this: he says, according to his own account, that he, and also his solicitor, knew everything about it in 1869. The very facts were told to him in 1869, and the doubt and difficulty was that up to a certain period in 1869 the stock had been treated as genuine by the company, dividends had been paid upon it as genuine stock, everybody supposing that it was entitled to a

preference. In 1869 the Acts of Parliament were more carefully looked into, especially with reference to the state into which the company had got, and then the solicitor for the company says: "I believe you have not got No. 1. Preference Stock really, but that it can only rank as stock issued under the Act of 1864." Then the Plaintiff's solicitor writes back to ascertain what the facts are, and the facts are all communicated to him. He still goes on hoping that, notwithstanding all that, these documents would give him No. 1 Stock, and from 1869 to the filing of this bill in 1874 he keeps this stock in his hands, avails himself of all the rights of it, and then asks that the stock may be taken off his hands and value given for it, he having kept it for all those years without making any claim. Upon that alone it would be impossible for him to maintain his suit to give him shares other than those he was dealing with. However, I rest my decision upon the fact that he has failed to prove that which is the essence of the case, namely, that he was in any way deceived by anything said to him.

BAGGALLAY, J.A.:—

The facts of the case have been so fully and frequently dwelt upon in the course of the argument, and by the Lord Justice in his judgment, that I do not propose to refer to them again. As regards the alleged misrepresentation, the directors and secretary state in the 14th paragraph of their answer that they believed that the £15,000 preference stock would be and be treated as part of the *Llanidloes* No. 1 Preference Capital, and rank and stand upon the same footing in all respects as the £85,000 *Llanidloes* No. 1 Preference Stock there referred to, being the balance of the £25,000 originally authorized to be raised as preference stock under the *Mid-Wales Railway Act* of 1860, and which was authorized to be issued, notwithstanding the amalgamation of the companies by the *Cambrian Act* of 1864. Upon the evidence which is before us, I am of opinion that the Plaintiffs, or rather the Plaintiff *Eaglesfield*, who alone attended to the transaction, believed the same thing at that time. I am aware that the bill states a different belief, and is based upon a different belief from that which the directors and secretary say they were under. The belief under which the Plaintiffs acted, as stated in the bill, is to be found in the 15th, 22nd,

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and 41st paragraphs. In paragraph 15 they say, "The £10,000 stock so purchased by the Plaintiffs as aforesaid from the said *Thomas Savin* was purchased by them from him at par, and as being *Llanidloes* No. 1 Stock, and it has never since been dealt with by them." In the previous 11th paragraph they had stated that the capital raised under the 15th section of the *Cambrian Act* of 1864 was in the afterpart of the bill referred to as *Llanidloes* No. 1 Stock, that is, the £85,000. So here we have an allegation on the bill that the Plaintiffs believed that the stock they bought was part of the £85,000, and if they believed this upon a representation by the Defendants that such was the case, there would have been a misrepresentation of fact. They put a similar statement in the 22nd paragraph where they say that "they intended to, and believed that they had, become the owners of £10,000 *Llanidloes* No. 1 Stock," that is, part of the £85,000 stock; and in the 41st paragraph they say that when they completed the transfer they believed it to be £10,000 part of the *Llanidloes* No. 1 Stock. Therefore, we have these three several assertions, the truth of which it was of the greatest possible importance to the Plaintiffs to affirm, and yet none of them are supported by the affidavit made by the Plaintiff *Eaglesfield*. When I find the statements in the bill, as to the belief of the Plaintiffs, occurring three several times, and that not one of these three paragraphs is affirmed by any statement in the affidavit, it becomes, I think, a very suspicious circumstance. As regards the first of the three allegations, namely, that when the Plaintiffs purchased the £10,000 stock they believed it was part of the particular stock referred to, the paragraph of the bill containing it comes between two other paragraphs, both of which are verified by affidavit, though it is not verified. With regard to the 22nd paragraph of the bill, they verify it in part, but omit to verify that portion of it which states that they intended to, and believed that they had, become the owners of £10,000 *Llanidloes* No. 1 Stock. The statement in paragraph 41 also is unsupported by affidavit. The bill was framed upon that alleged belief, but Mr. *Eaglesfield* found that as an honest man he could not make an affidavit up to that which was alleged in the bill, and therefore a variety of statements are used, such as that he negotiated upon that footing,

and that he did not suspect, and so forth, but which studiously abstain from saying he did so believe. If it stood upon that evidence alone, the Court would be justified in holding that, the burden of proof being on the Plaintiff to shew that he had been deceived, he had failed to prove his case. But when I regard his subsequent conduct this becomes still more clear. In the 21st paragraph of his affidavit he states, "It was not until some time in or shortly after the year 1869 that I had a suspicion of or a reason to suspect the existence of that deception." So that, taking any meaning of that clause, whether it was self-deception, or deception by any other person, he became aware of this deception five years and more before the bill was filed. I am not prepared to say that in an action for damages for misrepresentation the delay of five years in commencing the action would necessarily be a bar to the claim, but I do say that in proceedings against a company to set aside a contract on the basis of misrepresentation discovered by the party five years previously, and no proceedings taken to set the transaction aside, such delay must be fatal to the Plaintiffs' case. If the Plaintiffs were deceived they were at any rate undeceived by the proceedings that took place before the Vice-Chancellor in 1870, and by the communication that passed between the solicitors; but surely if they had believed that they had been deceived by the company, the directors, and the secretary, that was the time when complaint ought to have been made. There was nothing done for several years. They continue to conduct proceedings for the purpose of establishing their right to that which they originally believed they had. They take their chance of succeeding in establishing that this £10,000 should be held to rank equally with the £85,000, as they originally thought it would, but it is only when they find that that which they thought would rank with the £85,000 is not to rank with it, that this case of misrepresentation by the Defendants is set up for the first time. I am, therefore, of opinion that both these appeals should be allowed, and the bill dismissed with costs.

BRAMWELL, J.A.:—

I am of the same opinion. The Plaintiffs might have presented their case in either of two ways. They might have said that they

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knew they were getting a portion of this £15,000, and no part of the £85,000, and have complained of the misrepresentation as to the nature and rights of what they got. They would then have been met with this answer, that that was not a misrepresentation of any fact, but a misrepresentation, if at all, of a matter of law —a misrepresentation, or rather a misconception, in which they shared. The other way of presenting the case was the one which Mr. *Davey* told us this morning they relied on, that is to say, that the Plaintiffs supposed they were buying £10,000 of the £85,000 No. 1 Preference, when in point of fact *Savin* had it not to sell, as the Defendants all knew, and therefore a fraud was practised upon them, because *Savin* was proposing to sell a thing which he had not, and that to his knowledge and the knowledge of everybody else. The burden of proving that is undoubtedly on the Plaintiffs. They must prove that they supposed, and had reason to suppose, that they were buying a portion of this £85,000. If they could prove that, the rest would follow, because undoubtedly *Savin* knew he had it not, and the company and the officers must have known he had it not also. In my opinion the Plaintiffs wholly fail to prove that. I doubt very much whether they have alleged it in such a way as to pin themselves to it. It is a remarkable thing the gingerly way (for I know no other word to use) in which the bill states what they thought it was they were buying. *Eaglesfield* says he purchased from *Savin* £10,000 of the stock of the *Cambrian Railways Company*, "which was in sect. 15 of the *Cambrian Railways Act*, 1864, designated *Llanidloes* No. 1 Preference Capital." It is consistent with that that he knew he was buying £10,000 stock which was preference capital, and which was of the same quality as that which is called in sect. 15 No. 1 Preference Capital. A similar remark is applicable to the 15th and 41st paragraphs of the bill. To my mind it is very doubtful whether he states it, but it is absolutely certain he does not swear to it, as has been pointed out already. It is impossible that he could have believed it, because he had had dealings with this company and with *Savin* before he had made purchases of him, and knew his position, and in what way he had become possessed of stock of this character, and also was acquainted with the Act of Parliament. The story, therefore,

is impossible. The form of the transfer must have shewn him that there was something peculiar about this, because there were certain words in it which were not strictly applicable, as it appears to me, to this No. 1 Preference Stock as described by sect. 15. Then, in addition to that, there was that which has been pointed out, and is so forcible, that although the secretary, in his affidavit, had sworn that, to his belief, the Plaintiff *Eaglesfield* knew well he was not buying a portion of this £85,000, all *Eaglesfield* does when his attention is particularly challenged on that matter, and when it was open to him to have said in answer, "You are wrong, I did not know at all," is to say, "I thought I was buying No. 1 *Llanidloes* 5 per Cent. Preference."

Then there is another thing which has also been pointed out, and, indeed, I should say nothing about the matter (because I do not know that I add anything to what has been said before), except that in differing from the opinion of the Judge in the Court below I think it is better not to give a mere acquiescing judgment. The other point is this: The Plaintiff allows five years to go by from the time, not when he found out merely that a statement had been made as to the rights of the stock he bought, but, if his case is a true one, from the time when he was informed that he had not had transferred to him that stock which he thought he was buying—that *Savin* had it not, and that the company ought not to have made any such statement concerning it. He allows five years to pass without complaint. In the year 1869, five years before the bill was filed, he must have known, if his case is true, that an actual fraud and deception had been practised upon him, or, at all events, that by some strange mistake while he thought he was buying one stock *Savin* thought he was selling another.

If this case had gone before a jury to be dealt with as men of the world would deal with a charge of this description, I should say they would have scouted the notion that this gentleman had been in any way deceived. It may be that there has been a misrepresentation. As to that I say nothing at all, but if there has been a misrepresentation at all it is not a misrepresentation that he was getting this stock, but a misrepresentation, under a misconception in which he shared, as to the rights of the new £15,000 stock. But I am of opinion that the Plaintiff has wholly failed to make

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out that he bought and thought he was getting a portion of this £85,000. To my mind he has not only not made that out, but I should say affirmatively that upon the evidence I am satisfied he knew he was not buying that, but that he knew what he was buying, and got what he thought he was buying.

Solicitors for Plaintiffs: *Woodrooffe & Plaskitt.*

Solicitors for Defendants: *Milne, Riddle, & Mellor*, agents for *H. C. Corfield, Oswestry.*

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MASTER *v.* HANSARD.

[1876 M. 135.]

Restrictive Covenant—Covenant running with the Land—Easement—Disposition by Owner of Two Tenements.

The owner of an estate granted a lease of a plot of ground to *A.*, who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built, on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to *B.*, who entered into a similar restrictive covenant. Within twenty years *A.* commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of *B.*'s house.

On bill by *B.* to restrain *A.* from erecting and the lessor from approving the building objected to:—

Held, that *B.* was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in *A.*'s lease enured for *B.*'s benefit.

Statement.

BY indenture dated the 1st of December, 1853, *Hansard* and *Rogers* demised to one *Masters* a piece of ground at the *Anerley Road, Penge*, with a building upon it known as the *Crystal Palace Hotel*, for the term of ninety-nine years, from the 24th of June, 1852. The deed contained a covenant by *Masters* that he, his executors, administrators, or assigns, would not during the term do anything upon the premises which might be an annoyance to the neighbourhood or to the lessees or tenants of the lessors, their heirs or assigns, or diminish the value of the adjacent property, nor should

nor would erect or build, or cause or permit to be erected or built, upon the said piece or parcel of ground thereby demised any dwelling-house, outbuilding, coach-house, stable, or other building nearer than twenty feet to the *Anerley Road*, and also should not nor would during the term erect or cause or permit to be erected upon the demised ground any other messuage, building, or erection whatsoever without first submitting the plans thereof to the lessors, their heirs and assigns, and obtaining their approval of the same.

On the 14th of May, 1858, *Hansard* and *Rogers* demised to *Hantler* an adjoining piece of ground with two houses thereon, for ninety-four years, from the 24th of June, 1857. This lease contained a negative covenant on the part of the lessee identical in its terms with the above negative covenant contained in the lease to *Masters*. It did not appear that *Hantler* when he took this lease knew anything of the terms of the lease to *Masters*.

After divers mesne assignments, the leasehold interest created by the lease to *Masters* was, by indenture dated the 12th of October, 1875, assigned to the *Crystal Palace Hotel Company*. The leasehold interest created by the lease of 1858 had in the meantime become vested in the Plaintiff, Miss *Master*.

In 1876 the *Crystal Palace Hotel Company* determined to enlarge the hotel by adding a new wing, and on the 10th of March, 1876, wrote to the lessors asking their permission to extend the hotel as shewn by the plan. It was not in dispute that the additional building was one the erection of which could have been restrained as unduly interfering with the Plaintiff's lights had they been ancient lights. The Plaintiff complained to the lessors, who stated that the buildings would be proceeded with. The Plaintiff thereupon commenced her action against the lessors and the *Crystal Palace Hotel Company*, claiming that the lessors might be restrained from giving their approval to the plans, or their consent to the erection of any buildings which would interfere with the access of light to the Plaintiff's house; that the Defendants might be restrained from erecting or permitting to continue erected on the lands of which the company were the tenants the building then in course of erection or any other buildings which would interfere with the access of light to the Plaintiff's house, or diminish the value of the house, and for damages and further relief.

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Vice-Chancellor *Bacon* held that the Plaintiff could not claim to have the restrictive covenant enforced in her favour, but directed an inquiry as to damages. The *Crystal Palace Hotel Company* appealed. The appeal was heard on the 25th November, 1876.

Argument.

Kay, Q.C., and *Romer*, for the Appellants, having read the judgment of the Vice-Chancellor, were stopped by the Court.

Hemming, Q.C., and *Method*, for the Plaintiff:—

We contend that this case comes within the principle as to dispositions by the owner of two tenements. If our lessors had remained owners of the hotel property, they could not have built in this way, for it would have been in derogation of their grant. The principle which we contend for is, that if the grantor has such an interest in the adjoining property that he can protect the easements which would have been enjoyed if that adjoining property had belonged absolutely to him, he is bound to protect them.

[JAMES, L.J., referred to *Booth* v. *Alcock* (1).]

The reason of the rule applies equally whether the grantor has an estate in the adjoining land or a right over it which enables him to secure an easement of light over it.

[BRAMWELL, J.A.:—Suppose the grant to the company had been in fee, would the covenant have run with the land?]

We submit that, if entered into for the benefit of our property, it would. At all events, there would be a right of suit in equity. But we need not go so high as that. All we need urge is, that necessary easements pass where the grantor has power to secure the enjoyment of them. The principles as to the grant by the owner of two tenements are shewn in *Swansborough* v. *Coventry* (2) and *Booth* v. *Alcock*, and extend to all cases where the grantor at the time of the grant has such right or ownership over the adjoining land as enables him to secure the lights of the land granted against obstruction.

[JAMES, L.J., referred to *Eastwood* v. *Lever* (3).]

An implied grant gives all necessary easements, an express

(1) Law Rep. 8 Ch. 663. (2) 9 Bing. 305.
(3) 4 D. J. & S. 114.

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grant, all convenient easements. Then, again, in the hotel lease there is a covenant not to do anything which will lessen the value of the adjoining property. This is a covenant introduced for the benefit of the adjoining property, and there is authority to shew that it enures for the benefit of all subsequent takers of that property: *Western* v. *MacDermott* (1); *Keates* v. *Lyon* (2). In *Child* v. *Douglas* (3) the Vice-Chancellor went too far as regards the *dictum* which intimates that every covenant restrictive of building must have been inserted for the benefit of the adjoining land. In *Keates* v. *Lyon* this was negatived; but that case is not against a covenant plainly intended for the benefit of the adjoining land enuring to the benefit of subsequent grantees of that land, and this is clearly such a covenant.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that this decree cannot be sustained. The Defendants, the *Crystal Palace Hotel Company*, are owners of a property under a demise for a term of years, and are erecting on it a building which may lawfully be erected unless they have put themselves under an obligation not to do so. The Plaintiff is the owner of an adjoining property under another demise for a term of years from the same lessors, of later date than that of the Defendants; he therefore cannot have acquired any right against them, except under some grant which could lawfully be made. Now, the lessors could not grant anything so as to derogate from the rights of their prior grantee. The Respondent, therefore, was obliged to rest his case on the covenants entered into by the Defendants' predecessor in title with the grantor, and the question is whether those covenants bring the case within the rule which says that the owner of two tenements who grants one of them cannot derogate from his own grant by anything he does on the property which he reserves, the property granted becoming entitled to easements known as easements derived by the disposition of the owner of two tenements. The Plaintiff contends that though the grantor when he made the grant under which the Plaintiff claims had ceased to be the owner of the Defendants' tenement, he had a right which

(1) Law Rep. 2 Ch. 72. (2) Law Rep. 4 Ch. 218.
(3) Kay, 560.

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he could have used in such a way as to prevent the Plaintiff's enjoyment of his property being interfered with in any way in which the grantor would not have been allowed to interfere with it if he had retained the Defendants' property, and that this interest brings the case within the rule as to the owner of two tenements. It would be a novel extension of that doctrine to hold that not only a grantor cannot do anything to derogate from his own grant, but that he is obliged to take active steps to prevent other persons from doing what he might not himself do. It cannot, in my opinion, be said that a right under a covenant is properly within the meaning of this rule. Then the Plaintiff says: "You, my lessor, could, under the covenants entered into with you by your other lessee, have prevented this erection; you had and have that right; you have granted me a piece of ground with a house on it, and you ought to enforce those covenants for my benefit." Now, when the Plaintiff took his lease he had no knowledge of the nature of the title to the adjoining property; all he knew was that the piece of property adjoining his had once been part of the same estate; he knew nothing of the covenant; the grant to him contains no notice of it, and it would be strange to say that a man who has taken a covenant for his own benefit can be prevented from dealing with it for his own benefit because he has granted parcels of the land to other people. The covenant is not mentioned in the Plaintiff's lease, and it cannot have been the intention of the parties thus to restrict the use of a covenant which was entered into, not for the benefit of the adjoining land, but for the benefit of the owner of the estate, that he might be able to make the most of it. It would be too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the Plaintiff, and we cannot imply one.

Baggallay, J.A. BAGGALLAY, J.A.:—

When this case was before the Vice-Chancellor it was insisted that there was a right to relief against *Hansard* and *Rogers* on the ground that they could not derogate from their own grant; that they could not derogate from it by building or by allowing build-

ing which they had a right to prevent; and that the Plaintiff was entitled to the benefit of the restrictive covenants, to the benefit of which *Hansard* and *Rogers* were entitled as against the *Hotel Company*. The Vice-Chancellor disposed of these points in favour of the Defendants, on the authority of *Keates* v. *Lyon* (1), and I shall not consider them further, as they have been dealt with by the Lord Justice *James;* but he directed an inquiry on the ground that if the light coming to the Plaintiff's windows was interfered with that gave him a right to relief. I am unable to follow this, and am of opinion that the decree must be reversed, and the bill dismissed.

BRAMWELL, J.A.:—

I am also of opinion that this appeal must be allowed. It is clear to my mind that the doctrine as to disposition by the owner of two tenements does not apply. *Hansard* and *Rogers* at the time of the grant to the Plaintiff's predecessors in title were not owners of the land on which the *Crystal Palace Hotel* is built in the sense of being able to make a grant of an easement over it, and there is therefore no reason why the law should imply a grant of one. In this case it is not complained that *Hansard* and *Rogers* are derogating from their grant by anything that they are doing. The complaint is that they do not act affirmatively to prevent other persons from doing certain acts. I am of opinion that we cannot extend the rule in this way. To take an extreme case, suppose the first grantees had covenanted to erect no buildings, and then trespassers had come in and built, could the Plaintiff have called on the landlord to take steps to turn them out? So if the lessees had erected buildings I take it that the Plaintiff, in the absence of any covenant by his landlords to that effect, could not call on the landlords to enforce against the lessees their covenant not to build. It did indeed occur to me during the argument that if it could be shewn that the covenants entered into by the lessees of the *Crystal Palace Hotel* property were meant for the benefit of the owners of the adjoining property, and had been made known to the Plaintiff's assignor when he took his lease, or possibly even if they had not been so made known, it might have

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(1) Law Rep. 4 Ch. 218.

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been said that the lessee of the second property was an equitable assignee of the benefit of those covenants. But when I look at the facts of this case I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained, and it seems to me that they have not precluded themselves from allowing these buildings to be erected. It appears monstrous to hold that this covenant, the existence of which was never communicated to the Plaintiff's predecessors in title when they took their lease is to be construed as enuring for their benefit. Such a construction would to some extent be derogating from the grant to the *Crystal Palace Company*. If a stipulation had been made with the Plaintiff to enforce the covenant in his favour, the first lessees might say, "You are not treating us fairly, we believed that you would enforce this covenant for the general benefit of your property, not in this partial way." I need not, however, go into that, as I hold that the Plaintiff is not the equitable assignee of this covenant, which is general, and not confined to the Plaintiff's property.

Solicitors: *Johnson & Master; C. C. Ellis & Co.*

C. A. 1876 C. J. B. *Nov.* 13. C. A. *Dec.* 21.

In re NEWMAN. *Ex parte* CAPPER.

Proof—Building Contract—Failure to complete in Time—Penalty—Liquidated Damages—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 31—8 & 9 *Will.* 3, *c.* 11, *s.* 8.

A contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit to the employer £10 per week for every week after that date during which the buildings should remain unfinished; also that, if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1000, as and for liquidated damages.

Before the 25th of December the contractors filed a liquidation petition, Their trustees carried on the works for a time, and then abandoned the con-

tract. Another builder was employed to complete the works, which were not finished till long after the 25th of December:—

Held, that the £1000 was in the nature of a penalty, and that the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works.

Decision of *Bacon*, C.J., reversed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 20th of April, 1875, articles of agreement were entered into between *Henry Newman* and *Samuel Newman*, who were builders at *Winchester*, carrying on business in partnership under the firm of *H. Newman & Son*, of the one part, and the Governors of the *Odiham Endowed School*, of the other part, by which *Newman & Son* agreed with the Governors to erect certain school buildings and a residence for a master, according to the specifications and the plans and drawings therein referred to, "the said works to be finished, completed, and delivered up, cleared of all scaffolding, rubbish, and other impediments, on or before the 25th of December, 1875, and, in default thereof, the said contractors shall forfeit and pay to the said Governors the sum of £10 per week, for every week after that date during which the said works shall remain unfinished and not delivered up." There was a further provision that, in case any of the materials used, prepared, or intended to be used by the contractors should be considered by the Governors' surveyor unsound or improper, the contractors would upon notice in writing remove them, and, in default of their doing so within three days after notice, it should be lawful for the surveyor to remove them at the expense and risk of the contractors, and all expenses thereby occasioned should either be deducted out of any moneys then or thereafter due to them from the Governors, or should be recoverable by them of the contractors as liquidated damages. There were similar provisions in case the surveyor should be dissatisfied with any master foreman, or workman employed by the contractors, and in case the surveyor should consider any part of the work unsound or improperly executed. And the Governors agreed to pay to the contractors as the price of the works the sum of £3290, by instalments, at the rate of 80 per cent. on the actual value of the work fixed and completed, from time to time when and as such percentage should amount to £500 or upwards, the same to be

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ascertained and certified in writing by the surveyor, and the remainder of the £3290 by two equal instalments, one to be paid immediately after the surveyor should have certified in writing to the Governors that all the works had been completely finished to his satisfaction, and the other at the expiration of three calendar months from the date of that certificate. There was a further provision that, in case of the contractors being, from bankruptcy or any other cause whatever, prevented from or delayed in proceeding with the works according to the contract, or not proceeding therewith to the satisfaction of the surveyor, it should be lawful for the Governors to rescind the contract, by giving the contractors seven days' previous notice in writing, and to employ any other builder or person to complete the works, and the amount then already paid by the Governors to the contractors should be considered to be the full value of the works executed by them, and the materials then on the premises should become the property of the Governors without any further payment for the same. And there was this final provision, that "in case this contract be not in all things duly performed by the said contractors they shall pay to the said Governors the sum of £1000 as and for liquidated damages."

On the same day *Henry* and *Samuel Newman*, with two sureties, *H. W. Frampton* and *T. H. Burton*, executed a joint and several bond for £2000, to secure to the Governors the due performance of the contract.

The works were commenced by *Newman & Son*, and were carried on by them until the 5th of November, 1875, when they filed a liquidation petition. Before this they had received from the Governors £1500 in respect of the work already executed. *W. H. Davis* was appointed receiver and manager under the petition, and he carried on the works until the appointment of *O. Capper* and *M. T. Gills* as trustees. They proceeded with the works until the 31st of December, 1875, when they became entitled to receive, and did receive, from the Governors a further payment of £500. On the 6th of January, 1876, the trustees gave notice in writing to the Governors that they had decided to abandon the contract. On the 3rd of February the Governors entered into a contract with *Frampton* and *Burton*, the sureties, for the comple-

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tion of the works on their own account, which contract contained a stipulation that nothing therein contained should prejudice the remedy of the Governors under the prior agreement and bond. The works were ultimately completed by the sureties, but not until September, 1876. In February, 1876, the Governors tendered a proof against the *Newmans'* estate for the sum of £1000 as liquidated damages for the breach of the agreement. The affidavit of proof made by the clerk of the Governors did not allege any particular damage. On the 29th of June the trustees gave the Governors a notice in writing that they rejected their claim against the estate, on the ground that it was not shewn that any damage had been sustained by the non-performance of the contract. Application was made by the Governors to the County Court. The Judge affirmed the decision of the trustees, on the ground that the final clause was intended only to fix a penalty for the non-performance of the contract. The Governors appealed to the Chief Judge.

Statement.

The appeal was heard on the 13th of November, 1876.

Argument.

De Gex, Q.C., and *G. W. Lawrance*, for the Appellants:—

The trustees having elected to abandon the contract, we are entitled, under sects. 23 and 31 of the *Bankruptcy Act*, 1869, to prove for damages. The contract gives us a right to prove for £1000. This is not the case of a large sum being specified as damages for the non-payment of a small one, in which case the Court might construe the sum as a penalty, notwithstanding that it is spoken of as liquidated damages, as in *Kemble* v. *Farren* (1). In a case like the present the Court will not interfere to alter the express contract of the parties: *Atkyns* v. *Kinnier* (2); *Galsworthy* v. *Strutt* (3). Even if the Court took on itself to estimate the damage caused by the non-opening of the schools at the time fixed, it could not do otherwise than adopt the estimate of the parties.

Roxburgh, Q.C., and *F. O. Crump*, for the trustees:—

This sum of £1000 is clearly intended to be only a penalty.

(1) 6 Bing. 141. (2) 4 Ex. 776.
(3) 1 Ex. 659.

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The general sweeping clause at the end embraces all the events for which special provision has been previously made. The sum of £10 per week is fixed as the damages for the non-completion of the buildings by the specified time; it could not have been intended that £1000 should also be paid in the same event. The bond of the sureties gave the Governors ample security for what they might have to expend in completing the buildings. Suppose the school had been finished a week after the 25th of December, could the Governors possibly be entitled to £1000 in addition to the £10? *Magee* v. *Lavell* (1) is distinctly in our favour. There Lord *Coleridge*, C.J., after referring to *Reilly* v. *Jones* (2) and *Kemble* v. *Farren*, said (3): "The general principle of law appears to be, that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty."

De Gex, in reply:—

In *Magee* v. *Lavell* there was a stipulation for the payment of a small amount of rates and taxes which were in arrear; therefore the principle of *Kemble* v. *Farren* (4) applied. In the present case, if the Respondents are right, the final clause in the contract has no meaning.

Judgment, C. J. B.

BACON, C.J.:—

The provisions of this contract are so plain that, however it may have been in other cases which have been mentioned, it would be very difficult to give any other meaning to them than that which they bear on their face. Of course it is necessary carefully to construe penal clauses in instruments of various kinds. But I do not see what similarity there is between the present case and that of *Kemble* v. *Farren*, because in that case the real contract was that where a payment of money was to be made periodically a default in paying that money should not be considered as the forfeiture of a penal sum. But what resemblance has that case to the present? The present case is this: The school governors,

(1) Law Rep. 9 C. P. 107.
(2) 1 Bing. 302.
(3) Law Rep. 9 C. P. 111.
(4) 6 Bing. 141.

for the benefit of the school, agreed to employ the debtors on certain terms, and I must say that their plain object was that the buildings should be completed by the 25th of December. That was the contract between the parties, that they should have the schools fit to use by that time. The contract contains a variety of stipulations, not at all unusual in such an instrument, and at the end of it there is that one upon which this discussion has arisen, that, in case of default being made in the performance of any of these stipulations, the debtors should pay to the Governors £1000 as and for liquidated damages. How am I to know that the Governors would ever have entered into the contract but for that clause? It was agreed that the debtors should build the schools in the way prescribed, and the very essence of the contract was, "You shall give us the schools by the 25th of December, and if you do not you shall pay to us the sum of £1000;" and the contractors say, "Very well." The contention on the part of the Respondents is that there was no contract for the payment of any particular sum of money, and that clause is referred to which provides that, if the schools shall not be completed by the 25th of December, the contractors shall pay a penalty of £10 per week from that time until the schools shall be completed. It is impossible now to ascertain that sum at all. The schools never can be completed within the time specified in the contract. They were not completed then, and now they never can be completed within the time. The trustees repudiated the contract, and under what circumstances? The liquidation commenced early in November. There may have been time enough between then and the 25th of December (I do not know whether there was, but the trustees seemed to think that there was) to complete the buildings, and at first they went on with the contract for that purpose, and they actually received a sum of money as payment towards the completion of the contract, but, as soon as it seemed to them likely to be an unprofitable contract, they made up their minds that they would have nothing further to do with it, and they threw it up.

What resemblance is there between this case and *Kemble* v. *Farren* (1), or any of the other cases cited?

(1) 6 Bing. 141.

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Here it was of the substance, the very essence, of the contract, that the buildings should be completed by the 25th of December. In November the trustees had the option of saying that they would or would not complete the contract, and they went on with it up to a certain time, when they repudiated it. The meaning of the clause, if it means anything at all, is, that the penalty of £1000 has been incurred. I cannot alter the contract; I cannot find any circumstances to induce me to say, or to justify me in saying, that in the events which have happened a less sum than £1000 should be paid. If I were to say that, I should be obliged to ask myself how much less than £1000 ought to be paid? What means have I of ascertaining that? It has not been suggested that there are any particulars of the amount of damage which has been incurred, and I do not know that anybody is in a position to furnish them. But I say that if the contention of the trustees were right, I should be puzzled greatly in either finding, or directing any other tribunal to find, the amount of the specific damage which has been sustained. The order is wrong, and the appeal must succeed. The Appellants must have their costs of the hearing in the Court below and of the appeal.

C. A. From this decision the trustees appealed. The appeal was heard on the 21st of December, 1876.

Argument. *Bagshawe*, Q.C., and *F. O. Crump*, for the Appellants:—

We contend that the £1000 is only intended as a penalty. *Kemble* v. *Farren* (1) clearly applies. The Governors are only entitled to prove for the actual damage they can shew that they have suffered. *Betts* v. *Burch* (2) shews that *Galsworthy* v. *Strutt* (3) and *Atkyns* v. *Kinnier* (4), which are relied on against us, are not binding authorities. And the latest case on the subject, *Magee* v. *Lavell* (5), is in our favour.

De Gex, Q.C., and *G. W. Lawrance*, for the Governors:—

It would be impossible to ascertain the amount of damages caused to the Governors by the school not having been opened at

(1) 6 Bing. 141.
(2) 4 H. & N. 506.
(3) 1 Ex. 659.
(4) 4 Ex. 776.
(5) Law Rep. 9 C. P. 107.

the time appointed. Pupils who would have come to this school may have gone to other schools. The £1000 was mentioned in order to meet this uncertainty, and the parties must be taken to have fixed the amount of damages themselves. The case is totally different from *Kemble* v. *Farren* (1). *Galsworthy* v. *Strutt* (2) and *Atkyns* v. *Kinnier* (3) were cases in the decision of which the late Lord *Wensleydale* took part. *Green* v. *Price* (4) is another authority in our favour. *Magee* v. *Lavell* (5) does not apply. Here certain damages are fixed for particular breaches of the contract, and the £1000 provides for all other breaches such as the one which has actually occurred, the damage resulting from which it would be impossible to ascertain.

JAMES, L.J.:—

I am of opinion that this case is clearly within those which have been referred to by Mr. *Bagshawe*. The authority of *Kemble* v. *Farren* cannot be considered as having been in any degree nibbled away by those cases before Lord *Wensleydale* which have been referred to, and which it is said shew that the principle of *Kemble* v. *Farren* is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble* v. *Farren*, in which it was laid down in broad terms that, wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty. The law is, I think, stated in a very satisfactory way in a case which was referred to in the argument of *Kemble* v. *Farren*, I mean *Astley* v. *Weldon* (6), in which Mr. Justice *Heath* said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." And Mr. Justice *Chambre* gave this instance: "There is one case in which the sum

(1) 6 Bing. 141.
(2) 1 Ex. 659.
(3) 4 Ex. 776.
(4) 13 M. & W. 695.
(5) Law Rep. 9 C. P. 107.
(6) 2 B. & P. 346, 353.

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agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the Plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty: the concluding clause applies equally to all the covenants." And Lord *Eldon* said (1): "There are many instances of the Defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold that, if the Defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2*s.* 6*d.* or 5*s.*, but if she offend in a case which has not been so provided for, she shall pay £200?" These observations appear to me to apply exactly to the case before us with regard to the argument which Mr. *De Gex* and Mr. *Lawrance* have pressed upon us, that there are in this agreement provisions in the nature of liquidated damages for specific things, that is to say, for such and such a breach you shall pay the extra expense occasioned, and for such and such another breach you shall pay the actual costs occasioned, and for another breach you shall pay £10 per week. Those, however, are all covered by the general clause at the end. Is it to be held that, if the Defendant happens to offend in any one case which has been provided for by those special stipulations, then he shall pay only the actual damages thereby occasioned, but, if he offends in any one case which has not been so provided for, he shall pay £1000? It is exactly within the very words of Lord *Eldon*. The fact that there are those special provisions made for special cases, and then that there is at the end a lump sum of £1000 mentioned for any breach of the contract, which of course includes all those breaches which are specially provided for, so that if the words are construed literally, the contractor would, in the event of his committing one of those particular breaches, have to pay not only the actual damages, but also the £1000, shews what a strong case it is for the application of the doctrine which was laid down in *Kemble* v. *Farren* (2).

I am of opinion that the order of the Chief Judge cannot be sustained.

(1) 2 B. & P. 352. (2) 6 Bing. 141.

BAGGALLAY, J.A.:—

Judgment, C. A. Baggallay, J.A.

I am of the same opinion. I will only add that the principle upon which *Kemble* v. *Farren* (1) was decided was commented upon by Lord *Westbury* in the case of *Thompson* v. *Hudson* (2) in these terms: "If the sum described as liquidated damages be a large sum, and the title to that sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages. It was an oppressive agreement; the sum named never could have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, and therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty." If further authority was wanted for the decision at which we have arrived in this case, I think it is found in the words used by Lord *Coleridge* in *Magee* v. *Lavell* (3), which appear exactly applicable to the present case.

BRAMWELL, J.A.:—

Bramwell, J.A.

I am entirely of the same opinion. I do not wish to quote anything I have said as an authority, and I do not wish to repeat it. Therefore, instead of repeating it, I will simply say that I abide by everything I said in *Betts* v. *Burch* (4).

It has been argued that in *Galsworthy* v. *Strutt* (5), and the other cases referred to by Mr. *De Gex*, we have the authority of Lord *Wensleydale* that this £1000 can be proved against the debtors' estate. If it were a question of bare authority, independently of principle, I should say that we have the rule laid down by Lord *Coleridge* in *Magee* v. *Lavell* expressly to the contrary, where he says (6): "If we look to the nature of the contract in the present case, it will be seen that it involves several events of various degrees of importance, and, therefore, according to the general principle governing such cases, the sum mentioned must be considered as a penalty and not liquidated damages." Therefore, if we had to choose between the opinions of Lord *Wensleydale* and

(1) 6 Bing. 141.
(2) Law Rep. 4 H. L. 1, 30.
(3) Ibid. 9 C. P. 107.
(4) 4 H. & N. 506.
(5) 1 Ex. 659.
(6) Law Rep. 9 C. P. 115.

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Judgment, C. A. Bramwell, J.A.

Lord *Coleridge*, the latter is, in my view, the law, and is consistent with the reason and principle of the thing, which I think depends upon the statute 8 & 9 Will. 3, c. 11, s. 8. I do not know that it is necessary for us to say that the decision in *Galsworthy* v. *Strutt* (1) was erroneous. It is certainly a most singular thing that never once in the course of his judgment does Lord *Wensleydale* refer to the statute of Will. 3. It seems to me, as I said in *Betts* v. *Burch* (2), that by some good fortune the Courts have in the majority of cases gone right without knowing why they did so. I cannot help thinking that what Lord *Wensleydale* did in *Galsworthy* v. *Strutt* was to look upon the covenant as an agreement not to do one thing, namely, that the covenantor or obligor would not carry on the business of an attorney, and that the clause that he would not solicit the clients of his late co-partnership was ancillary to what might be called the substance of the covenant he had entered into, or an explanation or enlargement of it. That may be the thing which operated on Lord *Wensleydale's* mind, though I confess he does not give expression to it.

I am of opinion that this appeal must be allowed. I may add that I cannot think there can be any difficulty in assessing the damages.

JAMES, L. J.:—

The Appellants will have their costs before the Chief Judge, as well as the costs of this appeal.

Solicitors for Appellants: *Pickett & Mytton*, agents for *Bailey & White, Winchester.*

Solicitors for Governors: *Lambert, Petch, & Shakespear*, agents for *C. & F. I. Warner, Winchester.*

(1) 1 Ex. 659. (2) 4 H. & N. 506.

ATTORNEY-GENERAL *v.* GREAT WESTERN RAILWAY COMPANY.

C. A. 1876 M. R. *August* 4. C. A. 1877 *Jan.* 12.

[1876 A. 119.]

Railways Regulation Act (5 & 6 *Vict. c.* 55), *s.* 6—*Opening of Railway*—*Inspector's Report*—*Jurisdiction*—*Board of Trade.*

Where an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied—the Board of Trade has exclusive jurisdiction in the matter—and the Court will not enter into the question whether the reasons given by the inspector do not shew on the face of the report that he has come to a wrong conclusion.

Statement.

THIS was an application for an injunction to restrain the *Great Western Railway Company* and the *Midland Railway Company* from opening for traffic a railway which had been constructed by them jointly.

By the *Bristol Port Railway and Pier* (*Clifton Extension*) *Act*, 1867 (30 & 31 Vict. c. cciv.), the *Bristol Port Railway and Pier Company* were authorized to construct, *inter alia*, a railway a little more than three and a half miles in length, commencing by a junction with the existing railway of the company, and terminating by a junction in the city of *Bristol* with the *Bristol and South Wales Union Railway*, now belonging to the *Great Western Railway Company*. The deposited plans did not exhibit any station as intended to be made at the former junction.

By the *Great Western and Midland Railway Companies* (*Clifton and Bristol*) *Act*, 1871 (34 Vict. c. xi.), the construction of the above railway (except the junction with the *Bristol and South Wales Union Railway*, which was to be abandoned) was made over to the *Great Western Railway Company* and the *Midland Railway Company*. The line was called the *Clifton Extension Railway*.

So much of the railway as reached from *Bristol* to *Clifton Down* was completed and opened several years before the present proceedings, and there remained to be completed so much as lay

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between *Clifton Down Station* and the junction with the existing railway of the *Bristol Port Company*, over which railway the *Great Western* and *Midland Companies* had running powers. The two companies proceeded to complete the *Clifton Extension* and to connect it with the line of the *Bristol Port Company* by a junction called *Sneyd Park Junction*, at which point they did not propose to make any station. There was upon the railway of the *Bristol Port Company*, within a quarter of a mile from the junction, a small station called *Seamills Station*. In 1875 the remaining portion of the railway, as designed, being complete, the *Great Western* and *Midland Companies* gave notice to the Board of Trade under 5 & 6 Vict. c. 55, s. 4, of their intention to open the railway. It was accordingly inspected by Colonel *Yolland*, the officer appointed by the Board, who reported to the Board as follows:—

"The *Clifton Extension Railway*, which is a double line, as already stated, forms a junction with the *Bristol Port and Pier Railway*, which is a single line, about six miles in length, between *Bristol* and *Avonmouth*, and there is no station for passengers at this junction who are to be carried on somewhere on the line to or towards *Avonmouth*. *Seamills Station*, on the *Bristol Port and Pier Railway*, is somewhat less than a quarter of a mile beyond *Sneyd Park Junction*, and this station has a platform of about fifty yards in length, while the length of the platforms on the *Clifton Extension Railway* at *Montpelier* and *Clifton Down Stations* is not less than 400 feet. I am perfectly aware that the notice received from the railway company limits my inspection to that junction at *Sneyd Park*, and if a station had been constructed at the junction I should have had no hesitation in recommending the Board of Trade to sanction the opening of the line for passenger traffic when the few other requirements which I have enumerated had been completed; but as there is no such station, and no sufficient station on the adjacent single line at *Seamills* to which the passengers could be carried, I am compelled to report that the opening of the further portion of the *Clifton Extension Railway* cannot be sanctioned without danger to the public using the same by reason of the incompleteness of the works."

The Board of Trade thereupon made an order, dated the 7th of

July, 1876, under 5 & 6 Vict. c. 55, s. 6 (1), suspending the opening of the railway. The companies disputed its validity, and the present action was commenced for the purpose of trying the question. The writ asked for an injunction to restrain the companies from opening the railway until the expiration of the period for which the Board of Trade had postponed, or might postpone, such opening.

The motion came on for hearing before the Master of the Rolls on the 4th of August, 1876.

Sir *H. Giffard*, S.G., *Miller*, Q.C., and *Rigby*, for the Plaintiff.

Hon. *A. Thesiger*, Q.C., *Davey*, Q.C., and *H. A. Giffard*, for the companies.

JESSEL, M.R. :— Judgment, M. R.

The real question I have to decide is the construction of the 6th section of the Act 5 & 6 Vict. c. 55. I dare say it could have been better worded if anybody could have prophesied that this question was going to arise; but I am not one of those Judges

(1) Sect. 6: "And be it enacted, that if the officer or officers appointed by the lords of the said committee to inspect any such railway or portion of railway shall, after inspection thereof, report in writing to the lords of the said committee that, in his or their opinion, the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railway, together with the grounds of such opinion, it shall be lawful for the lords of the said committee, and so from time to time, as often as such officers shall after further inspection thereof so report, to order and direct the company to whom such railway shall belong to postpone such opening for any period not exceeding one calendar month at any one time, until it shall appear to the lords of the said committee that such opening may take place without danger to the public; and if any such railway, or any portion thereof, shall be opened contrary to any such order and direction of the lords of the said committee, the company to whom such railway shall belong shall forfeit to Her Majesty the sum of twenty pounds for every day during which the same shall continue open contrary to such order and direction; and any such penalty may be recovered in any of Her Majesty's Courts of Record, or in the Court of Session or in any of the Sheriffs Courts in *Scotland:* Provided always, that no such order as aforesaid shall be binding upon any railway company unless therewith shall be delivered to the said company a copy of the report of the officer or officers on which such order shall be founded."

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who carp at the language of the Legislature, and say that the draughtsman might have put it differently. All draughtsmanship can be improved after you are aware of the questions which arise upon it. Judicially, as I understand, it is fair to interpret the language and ascertain what its meaning is, having regard to the nature of the evil which it is intended to guard against.

The 6th section is this:—[His Lordship then read the section.]

The question I have to decide is, whether the order of the Board of Trade has been properly made. First of all, what is the meaning of the section? As I understand it, it gives a jurisdiction to the Board of Trade to stop the opening of the line according to the inspector's report. They are not bound by his report; they may act upon it or not as they think fit. They only stop the opening until it shall appear to them, not by the report of their officer, but in any way they think fit, that it can be opened without danger to the public. They may call in another officer to report, or take any other step that they think fit. But there is this preliminary, they are not to exercise their jurisdiction without a sufficient inquiry, and a sufficient inquiry by an officer appointed by them, who is to inspect, and, after inspection, to report if the works are incomplete, and the grounds of his opinion. Now, in my view of the case, it is impossible for a Court of Justice to look at the grounds of the opinion. They are given for the information of the Board of Trade; if the Board of Trade think them insufficient, the Board of Trade will not act upon such an opinion. They can either send down another officer to inquire, or refuse to take any action at all. The object is, that the Board of Trade shall not act without sufficient information. But the meaning is that the jurisdiction is given to the Board of Trade, and when they have got the information they may act upon it or not, as they think fit.

It was said, first of all, that the officer must report incompleteness of the works. I agree, and the argument is that this particular officer has not reported incompleteness of the works. Now, that he has done so in words is beyond controversy. The only question is, whether the reasons he has given do not shew that the works, the incompleteness of which he objected to, are either works on another line or not works at all within that section. There are two objections, first of all, about the other line. In my opinion

he has reported that the works are incomplete because there is not a station at *Sneyd Park Junction*, which is a work on this line. No doubt there is something from which you may infer that if he had been satisfied there was a sufficient station at *Seamills*, he would not have considered it necessary to have a station at *Sneyd Park Junction*. That may very well be. An officer may report that, having regard to the precautions taken and the nature of the works on an adjoining line, less precautions may be taken upon this line. If, for instance, the gradients were so arranged that the neighbouring line ran into this line at a very steep gradient, he might say that particular precautions must be taken upon this line by reason of the steepness of the gradients on the immediately adjoining line. But if those steep gradients are altered, then those particular precautions will not be wanted upon this line; and I think it would be only reasonable and proper that the officer should have regard to the state of the neighbouring line from or to which the traffic is to proceed, in deciding upon what is necessary to decide. Therefore I think he has in fact reported that some work is incomplete on this line.

The next point was, it was said the want of a station was not incompleteness. Now the word "incompleteness" there is evidently to be used in its largest sense. "Incompleteness," no doubt, does mean, not finished—not complete. It cannot be used in that sense, for the officer inspects just before the opening, when everything is ready for the opening, and when the company allege they have finished their work, and therefore "incompleteness" cannot mean unfinished in that sense. The period having arrived at when the works are finished, it must mean something else. "Incompleteness" is used in a wider sense; it means anything imperfect or defective. We are familiar with it in many cases in that sense. An imperfect flower does not mean an unfinished flower, it means a flower which is wanting in some of those organs which most flowers are furnished with. It is called an imperfect flower, although it was never otherwise than it is. It is imperfect in that sense, and the word "imperfect," therefore, is fairly used as one of the meanings of "incompleteness." Now, where a man says the works are incomplete, what does he mean? The works, as I understand it, mean all that is done by the railway company.

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In my opinion the permanent way is no more nor less than a work, and a station is no more nor less than a work; they are all works done by the company, and, in fact, if you look at the 16th section of the *Railway Clauses Consolidation Act*, 1845 (8 Vict. c. 20), you will find them all classed together in one section under several sub-sections. Everything that a railway company may make, whether engine-houses, or warehouses, or stations, or watering-places, or turn-tables, or anything else they make and construct for any purpose whatever in connection with their railway, is in fact a work which they are authorized to construct; and if it is a necessary work in order to make the lines work with safety, it is a work as to the incompleteness of which, in my opinion, the engineer, or engineer officer, may report; and therefore it appears to me that the second objection fails, that the want of a station at a given place, or the incompleteness of that station in the sense of its being insufficient in size or imperfect on the ground of its arrangement, is as much a work within the section as any other work upon the line; consequently, I see no objection to the report on that ground.

It is not intended that a Judge should decide judicially upon these matters; it is left to the Board of Trade, they having the means of informing themselves, and means of inquiry which are not at the disposal of the Judicature, and it was assumed that the Board of Trade would exercise it in a reasonable manner, and that was, no doubt, the ground on which the jurisdiction was conferred upon them. Being of opinion that that jurisdiction has been conferred upon them, and that the preliminaries required by the Legislature are complied with, I think it is beyond my functions to inquire whether the Board of Trade have or have not properly exercised their discretion, which discretion, as I understand, has been vested in them by the Acts of Parliament, and, therefore, I shall grant the injunction.

By consent of the Defendant companies the order was made a final judgment, with costs.

C. A. From this order the Defendant companies appealed. The appeal was heard on the 12th of January, 1877.

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Argument.

Hon. *A. Thesiger*, Q.C., *Davey*, Q.C., and *H. A. Giffard*, for the Appellants:—

The ground on which we are interfered with is the alleged incompleteness of our works. "Works" are defined by the *Lands Clauses Consolidation Act*, 1845, s. 2. The *Railway Clauses Act*, 1845, s. 16, gives the company a power to erect such houses, &c., as they think proper, and the 86th section gives them power to become carriers. It was held in *Johnson* v. *Midland Railway Company* (1) that this was merely permissive, and did not make the company common carriers so as to oblige them to carry merchandise. We contend that similarly sect. 16 is permissive, and leaves the company at liberty to determine what buildings are necessary. A station is not necessary on every line; there have been instances of lines made simply for the purpose of connecting two lines. The deposited plans shewed no station at *Sneyd Park*, and the Legislature cannot be considered to have imposed on us the obligation to make one. The inspector does not shew on his report that the works are incomplete. He only alleges the absence of a station, which is no part of the works mentioned in the Act, and which we say we are not bound to make. Under the general Act, the compulsory powers expire in three years, the works need not be finished for five years, and the inspector is not to report till the works are finished. The Legislature, therefore, cannot be supposed to have given the Board of Trade liberty to require additional stations, which could not be made without compulsory powers. The 6th section of 5 & 6 Vict. c. 55, must be interpreted by comparing it with sect. 14. By sect. 15, if land is wanted for widening the line, then, on the certificate of the Board of Trade, the old compulsory powers are revived, but no additional compulsory powers are given, which confirms the view that the Board of Trade cannot order fresh stations, and that "works" in sect. 6 means only works necessary for the permanent safety of the line. The report, therefore, is not a report according to the Act, but is bad on the face of it, for it does not shew that our works are incomplete; what it says in substance being that passengers who have travelled on our line will be in danger when they get upon another line on account of the station on that line being insuffi-

(1) 4 Ex. 367.

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cient, and that therefore we ought to erect a station. The jurisdiction of the Board of Trade, therefore, never arose. There is evidence that a station at the point mentioned by the Board of Trade will be useless, because there are no roads at that point. The only cases having any bearing on the subject are *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1), and *Attorney-General* v. *Great Western Railway Company* (2).

Sir *H. Giffard*, S.G., *Miller*, Q.C., and *Rigby*, for the informant:—

We contend that if a sufficient report according to the statute has been made to the Board of Trade, they are the sole judges as to whether the railway should be opened or not, and we say further that they have exclusive jurisdiction to decide the question whether the report is sufficient or not. It is not unreasonable to construe the words of the statute as giving the Board power to require the company to make a station. Suppose the company were to make no station for 200 miles, that would certainly make the travelling unsafe, and it is reasonable that the Board of Trade should have jurisdiction to treat this as incompleteness of the works.

[BRAMWELL, J.A.:—Suppose the inspector were to say, "The works on this line are complete, but by reason of there being an insufficient station on a neighbouring line belonging to another company, I pronounce them incomplete and dangerous to the public.]

We contend that this Court has no jurisdiction to try the question whether that is a sufficient reason for ordering the railway not to be opened.

[JAMES, L.J.:—You are invoking the assistance of the Court.]

Yes, but only to enforce a right declared by the only tribunal having jurisdiction to decide as to the right. Then, as to the substance of the inspector's report, he must consider what the line ends in; it ends by running into another line, and he says that it ought to be finished off by a station. In order to meet a possible

(1) 2 W. R. 330. (2) Law Rep. 7 Ch. 767.

argument that a station is not wanted because there is a neighbouring one on the other line, he says that that station is an insufficient one.

[BAGGALLAY, J.A.:—Does not the language of the Act seem to refer rather to the incomplete finishing of the works authorized to be done than to the insufficiency of the works?]

We say that it refers to any kind of incompleteness which endangers the safety of the public. In *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1), the question turned upon a single or double line of rails, and the Master of the Rolls there observes upon the exclusive jurisdiction of the Board of Trade. Where the Legislature creates a special tribunal there is no appeal from its decision except so far as the Act gives one.

[BAGGALLAY, J.A.:—But the Board has no jurisdiction unless a report according to the Act is made.]

That, no doubt, is so, but here a report has been made according to the Act; the inspector has reported the works to be incomplete, and it is for the Board to judge of the sufficiency of his reasons.

Davey, in reply:—

I admit that if the inspector simply reports the works incomplete, this Court cannot interfere; but if he reports the works to be incomplete because something has not been done on the line of another company, I say that the report is bad on the face of it, and is not a report according to the Act.

JAMES, L.J.:—

I am of opinion that the judgment of the Master of the Rolls in this case cannot be disturbed. It is very important, no doubt, that all these special jurisdictions and powers which are given to departments of the Government, and other similar bodies, should not be exceeded, and that such bodies should keep themselves within the jurisdiction which is given to them. But, as it appears

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to me, it is no less important that we should set them the example of keeping ourselves within our proper jurisdiction, and I am of opinion that we have no jurisdiction to sit as Judges on appeal from a finding of the Board of Trade on the facts properly brought before them in this matter, and that we ought not to try to find reasons for substituting our judgment and decision for theirs. The Act of Parliament says: "If the officer appointed by the Lords of the Committee" (that is the Board of Trade) "to inspect any such railway or portion of railway shall, after inspection thereof, report in writing to the Lords of the said Committee that, in his or their opinion, the opening of the same would be attended with danger to the public using the same, by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working such railway, together with the grounds of such opinion, it shall be lawful for the Lords of the said Committee . . . to order and direct the company . . . to postpone such opening" for such time as is therein mentioned. That is to say, if the officer makes a report that in his opinion, by reason of the incompleteness of the works, there will be danger, and accompanies that opinion with the reasons for it, it shall be lawful to the Lords of the Committee to make the order. In this case the inspector has reported in terms that he is compelled to report—and of course "I am compelled to report" means, in common plain English, "I do report"—"that the opening of the further portion of the *Clifton Extension Railway* cannot be sanctioned without danger to the public using the same by reason of the incompleteness of the works." He has sent that report, together with the grounds of his opinion, to the Lords of the Committee. They have had before them the ground on which that opinion was formed, and having that before them they have come to the conclusion that they ought to exercise the power given them by the Act of Parliament, and they have exercised such power accordingly. We are then told that if we read not only those words, but the preceding part of the report, we shall find that the inspector has not in effect reported that the opening would be attended with danger to the public by reason of the incompleteness of the works—that although he has said so in terms, he has given reasons which shew that he did not mean it. That seems to me, whatever form of

language may be used, to amount practically to this, that the grounds which he has alleged for the forming of his opinion are not sufficient grounds, and that we are to say that they are not sufficient grounds, although the Board of Trade, who have had the matter before them under the Act of Parliament, have come to the conclusion that the grounds are sufficient. Of course they must have come to that conclusion before they acted on the report and opinion. If that is so, it seems to me we are really invited to try the validity or sufficiency of the grounds on which the Board of Trade have formed their opinion. It is argued that though the inspector professed to report that the works were insufficient, what he was really reporting was that something upon a neighbouring railway was inadequate, and that he was using indirect means of compelling the company to which that other railway belonged to make its station complete and adequate. I do not view his report in that light. He says this railway is incomplete for want of a station, and then, by way of answer to a pretence that he expected to be made on the other side, viz., that there would be no danger to the public by reason of the neighbouring station on the other line, he goes on to say that the station on the other line is not sufficient. I do not know where we should be landed if we were to encourage litigation on this subject by saying that this is so clear a case of improper conclusion that we ought to claim jurisdiction. If we were to assume jurisdiction in one case because we thought the conclusion of the inspector clearly wrong, the next case would be not so clear, another case something not so clear as that, and the result would be that every case in which a report of this class was made to the Board of Trade, and acted on by them, would be brought before the ordinary Courts of Law, which, in my opinion, was not the intention of the Legislature. I am of opinion, therefore, that the order of the Master of the Rolls was right, and that his judgment ought to be affirmed.

Judgment, C. A. James, L.J.

BAGGALLAY, J.A. :— Baggallay, J.A.

The question for our decision is whether the *Great Western and Midland Companies* are bound by the order of the Board of Trade of the 7th of July, 1876, by which they were prohibited from opening the *Clifton Extension Railway* between the *Clifton Down*

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Station and the *Sneyd Park Junction* for certain periods named in that order. Under the 6th section of the Act 5 & 6 Vict. c. 55, the jurisdiction of the Board of Trade to prohibit the opening of a railway only arises upon the inspector's reporting that, by reason of the incompleteness of the works or permanent way, or the insufficiency of the establishment for working the railway, there would be danger to the public in opening it, and the report must be accompanied with a statement of the grounds on which the inspector's opinion was founded. I entirely assent to what has fallen from the Lord Justice, that, where the jurisdiction of the Board of Trade has been properly exercised, that is to say, when it has been exercised on a report properly made under the provisions of the section, neither the Courts of the Chancery Division nor any other Court has jurisdiction to question it or revise it. The simple question appears to me to be whether this report of Colonel *Yolland* is a report duly made within the provisions of that Act of Parliament, for, as I have said before, the jurisdiction only arises upon a report being made in accordance with such provisions. The Act requires that there shall be a report of there being danger, in the opinion of the inspector, from one of two causes, incompleteness in the works of the permanent way, or insufficiency in the establishment for working the railway, and the reasons are to be given and the grounds to be assigned for the opinion upon either or both of those two points. I do not think that it was intended to be a matter of immateriality what the reasons were; I think it was intended that there should be full and sufficient reason assigned, for by a proviso at the end of the section the order is not to become binding on the company until such time as they have a copy of the report furnished to them, the object of that proviso being, I apprehend, that they may have an opportunity of knowing in what respects their works are incomplete or their establishment is insufficient. Therefore I think we must look at the reasons as a substantial part of the report. Now, Colonel *Yolland* reports that the opening of the further portion of the *Clifton Extension Railway* cannot be sanctioned without danger to the public using the same, by reason of the incompleteness of the works. If that had been the whole of the report, it would have been difficult to say that he had not in terms complied with the provisions of the

section; but those words are introduced by a reference to what he assigns as his reason for making the report, viz., that as there is no station at *Sneyd Park Junction*, and no sufficient station at *Seamills*, therefore he has come to the conclusion that the opening of the line would be unsafe. There again, if he had confined himself to saying, "As there is no station at the *Sneyd Park Junction*, I consider it would be unsafe to open the line," the absence of that station might be a very insufficient reason for his reporting that the opening of the line would be unsafe; but I apprehend it would be a reason with which the Board of Trade, and the Board of Trade alone, would have the jurisdiction to deal. But he has not confined it to that; he has shewn that there might be a substitution for the station at *Sneyd Park*, namely, a sufficient station at *Seamills*. Now, he has previously pointed out in what respect the station at *Seamills* is insufficient—it has only got a platform 150 feet long, whereas the platforms on the *Clifton Extension Railway* are 400 feet long. I think it is a fair inference from that that he considers that if the platforms which he found at *Seamills Station* had been made 400 feet long, then the reason for holding that the opening of the line would be unsafe to the public would have been removed. The report, then, comes to this, that the opening of the railway cannot be sanctioned without danger to the public using the same, that is, danger to the public using the line of the *Clifton Extension Railway* between the *Clifton Down Station* and the *Sneyd Park Junction*, by reason of there being a want of sufficient accommodation at a station on another railway. I must confess that this appears to me a very unsatisfactory reason, and I think that if I had to exercise my discretion on it, I should hesitate as to acting upon the report. Where, however, a report has been prepared under the authority of an Act of Parliament, and a public body acting under the authority of the Act has exercised a full discretion upon it, we ought to be very slow in interfering, and, therefore, though with much doubt and hesitation, I have arrived at the conclusion that we must consider the report as one made within the provisions of the 6th section of the Act of Parliament, and if it is a report so made, the jurisdiction of the Board of Trade arises, and over that jurisdiction we have no control.

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BRAMWELL, J.A.:—

I am of the same opinion. If the inspector has reported danger from the incompleteness of the works, and has given reasons to the Board of Trade for his conclusion, we cannot examine into the matter at all. Now, he has reported in terms that there would be danger to the public from the opening of the line, by reason of the incompleteness of the works; but it is said that, although he has done so in words, he has not really done so, because the context shews that he does not report the works to be incomplete. In my opinion, it is enough that he has done so in words, that he has found it as a fact, and given a reason, although the reason may be one which shews that his conclusion is an erroneous one. If, indeed, he had stated facts only, and had left it for the Board of Trade to draw their conclusion, it would be different. For instance, if he had merely said, "I find that there is no station at *Sneyd Park Junction*," or, "I find that there is no station at *Sneyd Park Junction*, and that there will be danger to the public from the opening of the railway," the question would have arisen whether that was such a report as is required by the Act. Here, however, he has not found the facts and left others to draw the conclusion, but he has found the conclusion, as matter of fact, that there will be danger to the public by reason of the incompleteness of the works, and so has brought himself within the Act of Parliament. He gives his reason afterwards, which I think a bad one. I am sorry for the conclusion I come to, because a very slight alteration in the words of the report would have made me take a different view of the case, and because it is clear to my mind that the conclusion in the report is erroneous. It must not be supposed that I intimate the slightest doubt as to its being desirable that a station should be made at the junction, or that the *Seamills Station* should be enlarged; it would never occur to me to set up my judgment against that of Colonel *Yolland* on such a point, but I am satisfied, in point of law, that, in finding these works to be incomplete because there is no station at the junction, he misconstrued the Act of Parliament, and found that which the facts did not justify him in finding.

Solicitors: *Solicitors to Board of Trade; R. R. Nelson.*

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[1875 H. 205.]

Practice—Appeal for Costs—Right to open the whole Decree—Judicature Act, 1873, *s.* 49—*Rules of Court*, 1875, *Order* LVIII., *r.* 6.(1)

A bill was dismissed by a Vice-Chancellor without costs. The Plaintiff appealed against the whole decree, and his appeal was dismissed:—

Held, that the Court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs.

Statement

THE bill in this case was filed by an execution creditor for the purpose of getting the benefit of an elegit upon the equity of redemption of his debtor's land.

Vice-Chancellor *Bacon* dismissed the bill, but without costs. The Plaintiff appealed from the whole decree.

Argument.

Kay, Q.C., *Laxton*, and *Cooper Willis*, for the Appellant.

Hemming, Q.C. (*Cottrell* with him), for the Defendant, asked that, in the event of the Court holding that the Vice-Chancellor was right in dismissing the bill, the decree might be varied by dismissing the bill with costs. The Defendant had not given notice of his intention to apply for this variation, but it was not absolutely necessary to do so, as the whole decree was open, and the Court had full power to do justice under Rules of Court, 1875, Order LVIII., rule 6.

Judgment.

JAMES, L.J., said that the Court had no power to alter the direction of the Vice-Chancellor as to costs, which were entirely within his discretion. The 49th section of the *Judicature Act*, 1873, was imperative.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

THE COURT held, on the merits, that the Vice-Chancellor was right in dismissing the bill; and accordingly dismissed the appeal with costs.

Solicitors: *J Croft; T. W. Payne.*

(1) See 44 (1875) Ch D. 369

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WARNER *v.* MURDOCH.

[1876 W. 133.]

MURDOCH *v.* WARNER.

[1876 M. 189.]

Trial by Jury—Trial before a Judge of Chancery Division—Judicature Act, 1873, *ss.* 29, 30, 37—*Rules of Court*, 1875, *Order* XXXVI., *rr.* 1, 4, 8, 16, 29, 29*a*; *Order* XXXIX.; *Order* XLI., *rr.* 1, 5.

A trial by jury cannot be heard before a Judge of the Chancery Division. Actions commenced in the Chancery Division, if they are to be tried by a jury, must be set down in the general list, to be tried by one of the Judges of the Common Law Divisions.

Clarke v. *Cookson* (1) approved.

Statement.

THE first of the above-mentioned actions was brought by the trustees of the *United Kingdom Temperance and General Provident Institution* to set aside a policy of assurance on the life of *John Turner*, deceased, on the ground of misrepresentation in the policy. The second action was brought by the Defendants in the first action, who were the personal representatives of *John Turner*, against the trustees of the company, for the recovery of the sum secured by the policy.

On the 16th of November, 1876, on the application of the Plaintiffs in the first action, the Master of the Rolls made an order consolidating the two actions, and giving the control of the proceedings to the Plaintiffs in the first action; and at the request of the Defendants in the first action he also ordered that the action should be tried before a special jury, but that the trial should not take place without further order.

On the 11th of December, 1876, by arrangement between the parties, an application was made by the Plaintiffs for a direction to the Registrar to set down the action to be tried before the Master of the Rolls with a jury, whereupon his Lordship, without hearing any argument or expressing any opinion of his own, said that he thought it right to follow the decision of Vice-Chancellor

(1) 2 Ch. D. 746.

Hall in *Clarke* v. *Cookson* (1), that trials with a jury could not be heard before a Judge of the Chancery Division.

From this decision the Plaintiffs appealed.

Chitty, Q.C., and *Kekewich*, for the Appellants:—

Consider how the practice stood as to trials by jury before the *Judicature Act*. *Lord Cairns' Act* (21 & 22 Vict. c. 27) gave the Court of Chancery power to have cases tried by a jury before the Court itself, and the operation of this enactment was extended by *Sir J. Rolt's Act* (25 & 26 Vict. c. 42). The *Judicature Act*, 1873 (36 & 37 Vict. c. 66), did not repeal either of these Acts, but gave the High Court all the powers which the several Courts had before it passed. By sect. 23 the jurisdiction thus conferred on the High Court is, in the absence of any special provision in the Act or Orders, to be exercised, so far as regards procedure and practice, in as nearly as may be the same manner as it might have been exercised by the Courts from which it was transferred. To the same effect is sect. 21 of the *Judicature Act*, 1875. Now, there is nothing in the Act or Rules to prevent this jurisdiction being exercised in the same way as before. The 29th and 30th sections of the *Judicature Act*, 1873, are not sufficient for this purpose. *Cannot* v. *Morgan* (2) contains a clear expression of opinion by the Lord Chancellor that a case may be tried by jury before the Court of Chancery. The Master of the Rolls gave no opinion of his own, but followed the only reported case on the subject, *Clarke* v. *Cookson*. The Vice-Chancellor there refers to several sections of the Act which, it is submitted, do not justify his conclusion. Sect. 29 is an enabling clause, and does not appear to exclude trials by a jury elsewhere. Sect. 30 prescribes that sittings for trial by jury are to be held in *London* and *Middlesex*. The Judges of the Court of Chancery sit in *Middlesex*, and their sittings are sittings in *Middlesex*, and they are so called in Order LXI., rule 1. If sittings in *Lincoln's Inn* are not to be considered sittings in *Middlesex*, then the Judges who sit at *Lincoln's Inn* during the Long Vacation under Order LXI., rule 5, have no jurisdiction. Then, as to sect. 37, we contend that it only means that there are to be certain sittings at certain places for trials by jury only, and

(1) 2 Ch. D. 746. (2) 1 Ch. D. 1.

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Argument.

that it does not say that an action shall not be tried before a jury elsewhere. Order XXXVI., rules 1, 8, 16, have been referred to as opposed to our view, but the only thing against us in these rules is that they do not expressly refer to trials by jury before the Court in the Chancery Division. If a suit had commenced in Chancery before the Judicature Acts came into operation, it would be a hard thing to deprive the suitor of his right, under *Lord Cairns' Act*, to a trial by jury. It is observable that, although by Order XXXIX., rule 1, the mode of procedure in moving for a new trial, either before a jury or a Judge without a jury, in the Queen's Bench, Common Pleas, and Exchequer Divisions, is provided for, there is no regulation as to motions for new trials in the Chancery Division. The reason for this is that the Legislature intended to leave the old practice in the Court of Chancery as to new trials, which are regulated by the Consolidated Orders XLI., rule 46, untouched. This is an indication that it was not intended to interfere with general procedure as to trials by jury in the Court of Chancery.

H. M. Sladen, for the Defendants, referred to rule 29a (December, 1876) of Order XXXVI.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls cannot be disturbed. There is really no question of jurisdiction here. Whatever jurisdiction the Court of Chancery formerly had has now been transferred to the High Court of Justice. The only question is as to the mode of procedure, and no one has a vested right in any particular form of procedure. Formerly the suitor in Chancery had a right to a trial before a Judge of the Court of Chancery with a jury, and it is said that he must still have that right. But a man has no vested right to have his cause tried before a Judge of the Chancery Division any more than he had formerly a vested right to have it heard by a particular Judge of the Court of Chancery, or a vested right to prevent its being transferred from one Judge to another. Certain modes are prescribed by the *Judicature Acts* for trials of actions. A man may now bring in the Chancery Division almost any variety of action

which might have been brought in the Common Law Courts. Then the pleadings proceed until the action is ready for trial, and it is wholly immaterial to the suitor whether it is set down for trial before one Judge or another. The 1st rule of Order XXXVI. says that where no place of trial is named in the statement of claim, the place of trial shall, unless a Judge otherwise order, be the county of *Middlesex*. It appears to me that exactly the same course is to be pursued in whatever Division the action may be. If it is a country case, it will be tried at the assizes; if a *London* case, at the sittings in *London;* if in *Middlesex,* or if no place be mentioned, then in *Middlesex*. All the actions for trial will be set down in the general list, without regard to the Division in which they are commenced, and each action will be tried by the particular Judge on whom that duty devolves of trying actions on the particular day on which the action comes on in its turn for trial. Whether it was begun in the Chancery or any other Division, it follows the same course. That appears to me the plain meaning of the Act and of the Rules. The whole fallacy of the Appellant's argument consists in supposing that a suitor in Chancery has a right which no other suitor has to have his case tried in a particular mode. The appeal must be dismissed.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion. The Master of the Rolls has decided that this is a proper case to be tried by a jury: it is for us to say whether, on the construction of the Act and the Rules, it should be tried before the Master of the Rolls, or should go in the general list of actions for trial in *Middlesex*. I think that if the words of the Acts are attentively considered it is clear that the intention of the Legislature in framing the Judicature Acts of 1873 and 1875, was, that all actions not marked for trial in the country or in *London* should go into the general list, and be tried in *Middlesex*. The 16th section of the Act of 1873 transfers the jurisdiction of the Court of Chancery and the other Courts to the High Court of Justice. Then the 22nd section provides that none of the jurisdiction so transferred shall be exercised except by the High Court of Justice, as provided by the Act; and the 23rd section enacts that the jurisdiction, when transferred, shall be

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exercised in the manner provided by the Act, or by the Rules to be made, and where no special provision is made by the Act or the Rules, according to the old practice in the Courts from which the jurisdiction had been transferred. The Act then goes on, in the 29th and 30th sections, to provide for the trials of actions generally—for those in the country at the assizes, and for other actions in *London* and *Middlesex*. These sections are perfectly general, and apply to all trials by jury; there is no distinction made between actions in Chancery and in the Common Law Divisions, inasmuch as in the sections of the Act previous to the 30th no division had been made of the High Court of Justice. But in the following sections it is provided that the High Court of Justice shall be Divided into several divisions, and special duties are assigned to particular Divisions. In the 37th section it is provided that, subject to any arrangements which may from time to time be made by mutual agreement between the Judges, the sittings for trials by jury in *London* and *Middlesex*, and the sittings under commissions of assize, oyer and terminer, and gaol delivery, shall be held by the Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions. That must apply to all trials by jury under the 29th and 30th sections, and it makes no distinction between actions commenced in the Chancery and any other Division. It appears to me that this is carried out by the 1st rule of Order XXXVI., which provides that if a Plaintiff proposes to have the action tried elsewhere than in *Middlesex*, he must name the place in his statement of claim; that is perfectly general, and applies to all actions. Then the 8th rule provides that the notice of trial shall state whether it is for the trial of the action or of issues therein, and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial. Why is this provision for an additional notice in those particular Courts inserted unless the earlier part of the rule applies to all the Courts? Then the 16th rule says that the lists of actions in *London* and *Middlesex* shall be prepared without reference to the Divisions to which they were attached. It appears, therefore, to me clear, upon the construction of the Act and of the rules to which I have referred, and with which the others are quite consistent, that the intention was that a trial by

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jury should be held before a Judge of one of the Common Law Divisions, from whatever Division the action might come, either at the assizes or in *London* or *Middlesex*. It was urged that it would be inconvenient to send cases from the Chancery Division to be tried in *Middlesex* before a Common Law Judge; but I cannot see that there would be greater inconvenience in this than in trying a Queen's Bench action before a Judge of the Common Pleas or Exchequer Division. It was also contended that the fact that there is no provision under the new Rules for obtaining new trials in actions attached to the Chancery Division, is an indication that it was not intended to alter the practice of the Court of Chancery as to the trial of actions by a jury. I think that this objection is answered by Order XXXIX., rule 1, the effect of which is that applications for new trials of actions in the three Common Law Divisions need not now be made, as under the old practice, to the Court to which the action is attached, but may be made to any Divisional Court. But as to actions in the Chancery Division there was no intention to make a change in the mode of applying for a new trial; application may still be made to the Judge of the Chancery Division before whom the action is set down. I think, therefore, that the view taken by the Master of the Rolls is not only consistent with the Act and the Rules, but that it will most promote the public convenience that all actions from any Division shall be tried at one place and included in one list.

Judgment, Baggallay, J.A.

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BRAMWELL, J.A.:—

Bramwell, J.A.

I am of the same opinion. I merely wish to make two observations. It is argued on behalf of the Appellants that the provisions in the Act directing that there should be only one list of actions for trial by jury only applied to the Common Law Divisions. If that be so, it is difficult to see what need there was for a provision that the cases should be tried by Judges of these Divisions only. It appears necessarily to follow from that enactment that the Judges of those Divisions are to try jury cases from the Chancery Division also. The other observation is this. The new rule 29a of Order XXXVI. of December, 1876, which was referred to by Mr. *Sladen*, provides that "where in any action in the Chancery Division the action or any question at issue in the action is ordered

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to be tried before any commissioner or commissioners of assize, or at the *London* or *Middlesex* sittings of any Division other than the Chancery Division, the order directing such trial shall state on its face the reason for which it is expedient that the action, question, or issue should be so tried and should not be tried in the Chancery Division." It does not follow that this rule assumes that there are to be sittings of the Chancery Division in *London* and *Middlesex* for trials by jury, for there are sittings of that Division for trials of actions in *London* and *Middlesex* without juries. Besides, the rule only applies to a case where an order has been made, and not to an action which goes, so to speak, of its own accord to be tried at the *Middlesex* sittings. It applies to cases in which a place is named by the Plaintiff in his statement, and the Judge orders the action to be tried elsewhere, and to cases where, under rule 29 of Order XXXVI., the Judge orders an issue to be tried before commissioners, or at the assizes, or in *London* or *Middlesex*. In both these cases when the order is made the Judge must state his reasons. That supposes that a Chancery Judge would order an issue to be tried elsewhere than before himself. It certainly would be a curious thing if it was intended that a Chancery Judge should try the action before himself, and yet should send an issue arising in the action to be tried elsewhere. I cannot think that was intended. The appeal must be dismissed, and the action must be set down to be tried in the general list. The costs of all parties will be costs in the cause.

Solicitors: *C. Gatliff; Ottaway.*

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C. A.
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Nov. 30;
Dec. 9.
1877
Jan. 13.

Administration Suit—Deficient Estate—Unclaimed Dividends—Funds subsequently coming in.

Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts.

Statement.

THE questions involved in these appeals from a decision of Vice-Chancellor *Malins* (1) related to the disposal of certain funds in Court, representing portions of the real and personal estate of a testator named *Charles Pitfield*, who died on the 4th of August, 1740. The funds represented, in part, moneys which, in the year 1792, were ordered to be paid to certain creditors of the testator, but were not so paid, and, in part, moneys forming portion of his personal estate which had been but recently realized. The following statement of the facts of the case is taken from the judgment of *Baggallay*, J.A.:—

Shortly after the death of *Charles Pitfield*, the suit of *Hervey* v. *Ashley* was instituted for the purpose of establishing certain claims against his estate, and by the decree made in the suit on the 11th of August, 1748, it was, amongst other things, ordered that his personal estate should be applied in payment of his debts and funeral expenses and legacies in a due course of administration, and the usual accounts and inquiries were directed. On the 8th of June, 1785, the cause of *Hervey* v. *Ashley*, with other causes supplemental to it, came on to be heard for further directions, and, the Master having certified as to the debts of the testator, and that his personal estate was insufficient for the payment of them, it was ordered that his freehold estates should be sold and the proceeds brought into Court, and it was further ordered that

(1) 1 Ch. D. 243.

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the debts should be paid as directed by the original decree, and that in case the specialty creditors should exhaust any part of the personal estate, the simple contract creditors should stand in their place and receive satisfaction out of the real estate. In pursuance of the directions contained in this order, the freehold estates were sold, and, on the 27th of June, 1792, the Master reported that certain specialty creditors and creditors having specific and prior liens had been paid the amounts due to them to an amount in the aggregate exceeding £20,000; that the debts remaining due, together with interest on such of them as carried interest, amounted to £18,262 15*s.* 11*d.*; that the sums so paid to specialty creditors had been paid out of personal estate; and that the proceeds of the real estate were not nearly equal to the amount of personal estate which had been so applied. By an order made in the said causes, and dated the 21st of July, 1792, it was ordered that the several sums of cash mentioned in the order, and which had arisen from the real and personal estate of *Charles Pitfield*, should be applied in the first place in payment of certain costs, and in the next place in payment in full of such of the specialty debts as remained unpaid, and that the balance of such cash should be divided amongst the simple contract creditors in proportion to the amounts due to them; and it was referred to the Master to settle the proportions in which such amounts were to abate, and the balance of cash was to be paid to the simple contract creditors in the proportions to be so ascertained by the Master, or to the legal personal representatives of such of them as should be dead.

By his report, bearing date the 9th of August, 1792, the Master certified that he had set forth, in the first schedule thereto, an account of the specialty debts, amounting in the aggregate to the sum of £1774, which were to be paid, pursuant to the order of the 21st of July, 1792, out of the sums of cash mentioned in the order, and that the aggregate amount of cash to be divided amongst the simple contract creditors, pursuant to the same order, was the sum of £8026 7*s.* 11*d.*, and that he had in the second schedule to his said report set forth the sums due to each of such simple contract creditors respectively, and the proportions which each of such creditors was entitled to receive of the said sum of £8026 7*s.* 11*d.*

The majority of the specialty and simple contract creditors

named in the report received the sums to which they were entitled by virtue of the order and report, but the sums to which others of such creditors were entitled were not received by them, and, consequently, of the sums thus ordered to be applied in payment of debts there were left in Court the several sums of £3146 16*s.* 3*d.* cash and £425 10*s.* cash respectively, standing to the credit of the cause of *Sturt* v. *Hervey* (which was one of the supplemental causes), the former sum standing to the credit of the real estate account, and the latter to the general credit of the cause.

The fact that these sums had been left in Court remained undiscovered or unnoticed until the year 1867, but on the 10th of July in that year an order was made by Vice-Chancellor *Malins*, on the petition of *Henry Gerard Sturt*, who was the heir-at-law or otherwise represented the real estate of *Charles Pitfield*, directing an inquiry as to the persons legally and beneficially entitled to them, and it was ordered that these sums, which had remained in Court uninvested for seventy-five years, should be invested in bank annuities. These sums were accordingly invested, and at the date of the order of the Vice-Chancellor, from which the present appeals were brought, were represented by the sums of £4024 Bank Annuities, £233 1*s.* 3*d.* on deposit, and £2 6*s.* 7*d.* cash, all standing to the credit of the real estate account, and the sums of £389 19*s.* 9*d.* Bank Annuities and £12 14*s.* 5*d.* cash to the general credit of the cause.

The testator, *Charles Pitfield*, had, at the period of his decease, an interest in the estate of one *Alexander Pitfield*, who had died some years previously, and who was a shareholder in the *Shadwell Waterworks Company*. Some time previously to the order of the 10th of July, 1867, the *Shadwell Waterworks Company* had been dissolved, and as its assets were about to be divided it was deemed advisable that the estate of *Alexander Pitfield* should be represented, and the order of the 10th of July, 1867, was accordingly made in the cause of *Ashley* v. *Ashley*, which was a suit for the administration of the estate of *Alexander Pitfield*, as well as in the cause of *Hervey* v. *Ashley*, and in the causes supplemental to the same respectively; and one *Harvey Dibben* was appointed by that order a trustee of the will of *Alexander Pitfield*, in the place of the deceased trustee thereof, and it was ordered that he should

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represent the estate of *Alexander Pitfield* for the purposes of the proceedings in the matter of the *Shadwell Waterworks*.

The shares in the *Shadwell Waterworks* were personal estate, and, by reason of the proceedings in the above matter, further sums of considerable amount were paid to the credit of the cause of *Sturt* v. *Hervey*, "The account of *Charles Pitfield's* one-fourth of two shares in *Shadwell Waterworks*," and were invested; and by an order made by the Vice-Chancellor *Malins* on the 15th of January, 1875, upon the petition of *Henry Gerard Sturt*, it was ordered that, in addition to the inquiry directed by the said order of the 10th of July, 1867, it should be inquired who were the persons legally and beneficially entitled to the funds so paid and transferred.

The inquiries directed by the orders of the 10th of July, 1867, and the 15th of January, 1875, were prosecuted in the Chambers of the Vice-Chancellor, and, with a view to the inquiry directed by the order of the 10th of July, 1867, advertisements were inserted in the *London Gazette* and divers newspapers, and by the certificate, dated the 5th of April, 1875, and approved by the Vice-Chancellor on the 20th of the same month, it was certified that the sums of cash mentioned in the order of the 10th of July, 1867, consisted of sums not claimed by and not paid to certain of the specialty and simple contract creditors to whom, pursuant to the order of July, 1792, and the report of August, 1792, the same were payable, and that no claim had been established to such sums; and it was further certified that the several sums of Bank Annuities and cash mentioned in the order of the 15th of January, 1875, formed part of the personal estate of *Charles Pitfield*, and were in the first instance applicable to the payment of the balances due to his simple contract creditors, after deducting the sums paid or appropriated in part satisfaction thereof under the order and report of July and August, 1792. And it was further certified that the only claims which had been established in respect of such last-mentioned balances were the claims of *Louisa Moreton Dyer*, as administratrix *de bonis non* of *Elizabeth Swainson*, deceased, and the Honourable *Henry Cavendish Butler*, on behalf of the estate of *Solomon Ashley*, deceased, which *Elizabeth Swainson* and *Solomon Ashley* were two of the simple contract creditors of

Charles Pitfield, whose names were set forth in the second schedule to the report of the 9th of August, 1792.

The amounts of the debts of *Elizabeth Swainson* and *Solomon Ashley*, as set forth in the second schedule to the report of August, 1792, were £2788 5*s.* 3*d.* and £1042 16*s.* 11*d.* respectively, in respect of which the apportioned sums of £2016 0*s.* 4*d.* and £754 0*s.* 2*d.* were paid, leaving the respective balances of £772 5*s.* 4*d.* and £288 16*s.* 9*d.* unpaid. It appeared from the proceedings in the cause that these debts bore interest at £5 per cent. per annum.

It further appeared from the certificate that *Louisa Moreton Dyer* and *Henry Cavendish Butler* claimed interest on the above balances after the rate of 5 per cent. per annum from the 9th of August, 1792, and that the principal sums so claimed by them, with interest to the date of the certificate, amounted to the sums of £3888 2*s.* and £1450 19*s.* 3*d.* respectively.

On the 23rd of April, 1875, a summons was taken out by *Thomas John Pitfield*, who had been duly appointed to represent the estates of *Alexander Pitfield* and *Charles Pitfield*, to vary the certificate by striking out so much thereof as certified that the several sums of stock and cash mentioned in the order of the 15th of January, 1875, were in the first instance applicable to the payment of the balances due to the simple contract creditors of *Charles Pitfield* and all subsequent findings consequent thereon, and such summons was adjourned to be heard in Court at the same time as a petition which had been presented by *Louisa Moreton Dyer* and *Henry Cavendish Butler*, praying, in substance, that the costs of all parties of and incident to the application and consequent thereon, including in the costs of the Petitioners the costs of tracing out and investigating the title to the funds in Court as between solicitor and client, might be taxed and paid out of the sums of cash and stock in Court, and that, out of the residue of such stock and cash, the balances claimed to be due to them, with further interest at the rate of 5 per cent. from the date of the certificate, might be paid.

Such summons and petition came on to be heard before the Vice-Chancellor *Malins*, and on the 19th of November, 1875, it was ordered that the costs of the Petitioners and Respondents,

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and of the official solicitor, of and incident to the petition and consequent thereon, should be taxed as between solicitor and client, and when taxed should be paid out of certain of the moneys which had arisen from the interest of *Charles Pitfield* in the *Shadwell Waterworks*. And it was declared that five several sums of bank annuities and cash standing to the credit of *Sturt* v. *Hervey*, which represented the moneys which had not been paid pursuant to the order and report of July and August, 1792, were divisible among such of the creditors of *Charles Pitfield* mentioned in the first and second schedules to the report of the 9th of August, 1792, as had not received the amounts of their debts or the sums apportioned in respect thereof. And it was further declared that the simple contract creditors of *Charles Pitfield* mentioned in the second schedule to the report of the 9th of August, 1792, were entitled, out of the several other sums of bank annuities and cash standing to the credit of the said cause, and which represented the proceeds of the interest of *C. Pitfield* in the *Shadwell Waterworks*, subject to the payment of the costs thereinbefore directed to be taxed and paid, to be paid the balances due to them respectively, pursuant to the order and report of July and August, 1792, together with interest on the balances of such of the respective debts as carried interest after the rate of 5 per cent. per annum from the 9th of August, 1792, until the day of payment.

From that order of the Vice-Chancellor three appeals were brought, the first by the Petitioners, *L. M. Dyer* and *H. C. Butler*, the second by *Thomas John Pitfield*, in the interest of the next of kin, and the third by Lord *Allington*, formerly *Henry Gerard Sturt*, as the testator's real representative.

The appeals came on to be heard on the 3rd of April, 1876, and the Court took an objection to the form of the advertisements, as not well adapted, in the peculiar circumstances of the case, to attract the attention of persons interested. The appeals were, therefore, directed to stand over till further advertisements had been issued. In consequence of the fresh advertisements several additional claims were brought forward. Two of these claims were in respect of specialty debts included in the first schedule to the report of August, 1792, and the others were similar to those

of the Petitioners; no claim being brought forward in respect of any debt not included in the report of August, 1792.

1876. Nov. 30; Dec. 9. The appeals now came on to be disposed of, and, by consent of the parties, were heard by two Judges, *James*, L.J., and *Baggallay*, J.A.

Argument.

Glasse, Q.C., and *Murray*, for the Petitioners, *L. M. Dyer* and *H. C. Butler*:—

Where an estate is administered for the benefit of creditors, those only who come in participate, and may thus, if the other creditors neglect to come in, obtain payment in full, though the estate is insolvent. According to the same principle, even where an order has been made for distribution of the assets in hand among particular creditors, and then further assets come in, the Court has been in the habit of applying the whole of the fresh assets in payment of those creditors who come in again to claim their rights. This was long the settled practice, though there are few reported cases on the point. *Williamson* v. *Naylor* (1) and *Wild* v. *Banning* (2) are the earliest cases in print, and the more recent cases of *In re Cunningham's Trust* (V-C. W., April, 1865), *Horncastle* v. *Sewell* (M.R., 1868), *Newton* v. *Bennett* (V.-C.M., 1871), *Smith* v. *Smith* (M.R., December, 1871), *Hughes* v. *Lyon* (V.-C. S., 1870), *Stuart* v. *Tichborne* (May, 1873), *Stables* v. *Aitcheson* (July, 1873), are all the same way. *Alderson* v. *Petrie* (before Lord *Selborne* in 1873) did not relate to a new fund coming in. It was thought necessary to insert in the *Bankruptcy Act*, 1869, a special provision—sect. 116—that unclaimed dividends should not go to the other creditors. No laches is to be imputed to the Petitioners: *Dickenson* v. *Lord Holland* (3); and the *Statute of Limitations* is not stopped by the decree as against creditors who do not come in: *Watson* v. *Birch* (4).

[JAMES, L.J.:—There is a decree establishing the rights of a certain number of creditors. Any one who takes out representation to any of them is in the same position as the Petitioners. Why may not the Crown take it out?]

(1) 3 Y. & C. Ex. 208.
(2) Law Rep. 2 Eq. 577.
(3) 2 Beav. 310.
(4) 15 Sim. 521.

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The Crown must prove intestacy. There may be representation going on till the present time, and no claim have been made because the debts were satisfied *aliunde*, and the Court presumes such satisfaction to have taken place if the creditors do not come forward: *Hercy* v. *Dinwoody* (1).

J. Pearson, Q.C., and *Pemberton*, for the official solicitor:—

[JAMES, L.J.:—I think we are bound by *Alderson* v. *Petrie* as to the actually apportioned funds.]

We contend that the same rule must apply to the new funds. When a creditor is found entitled, he is in the same position as a legatee. Now, if a deficient estate had been apportioned among pecuniary legatees, and then fresh assets came in to an extent not sufficient to pay the legacies in full, the new assets clearly would be apportioned among the legatees, not merely among those who came forward to claim. In the cases referred to as supporting the claim of the Petitioners, the Court did not decide anything to help them. The order was worked out erroneously in the absence of any one to dispute the claims of the creditors who were present. In *Wild* v. *Banning* (2) the only question decided by the Court was between the testator's personal representatives and the creditors. No general reference was made as to who were entitled, and no one was present who was interested in arguing that the creditors who did not come forward on the second occasion were entitled to participate. In *Williamson* v. *Naylor* (3) the real question was whether the dispositions of the will were legacies or admissions of debt; and it appears (4) that the testator referred to the fact of his having satisfied some of his creditors. The exclusion of creditors who do not come in to claim under a common administration decree furnishes no principle applicable to the present case. Creditors cannot be found out in any other way than by advertising for them to come in and make their claims, and those who do not come in are excluded on the ground that they are presumed not to exist. That is quite different from excluding persons who have been found by the Court to be creditors. Suppose an executor to have divided all the assets in

(1) 2 Ves. 87.
(2) Law Rep. 2 Eq. 577.
(3) 3 Y. & C. Ex. 208.
(4) Page 215.

hand among the creditors then known. If fresh assets afterwards came in, nobody would think of advising him that he would be justified in applying them in payment of the creditors who were then forthcoming, to the exclusion of such of the others as could not then be found.

Higgins, Q.C., *Lovell*, and *Udal*, for the next of kin:—

The order of 1792 was final; there is no direction to compute subsequent interest. No liberty to apply is reserved. The suit could not have been revived. As to the old apportioned fund, we say that the Petitioners have got all they were entitled to, and have no shadow of claim to a further share. What the creditors who do not now appear have abandoned belongs to us, there being no one else who claims a title. Then, as to the *Shadwell Waterworks* fund, it is a derelict, and *primâ facie* belongs to us.

[JAMES, L.J.:—I should say that *primâ facie* it belongs to the creditors.]

No doubt we take subject to their claims; but as to those who do not appear, it must be presumed that their claims have been satisfied.

[JAMES, L.J.:—It would be a very forced presumption that somebody else has paid a man's debts fifty years after his estate has been administered by the Court].

The creditors who do not come in lose their rights by lapse of time: *Hercy* v. *Dinwoody* (1); *Hunton* v. *Davies* (2); *Wilkinson* v. *Lovell* (3); *Ex parte Dewdney* (4). Creditors can come in at any time, so the fund cannot be considered as appropriated to a class ascertained at a past time, *Lashley* v. *Hogg* (5), but belongs to those who come in. The fund then belongs to the next of kin, subject to the claims of creditors who now come in to establish them. Interest ought not to be allowed them, or if it is allowed, the sum divided in 1792 ought to be apportioned between the principal and interest then due; and interest only at 4 per cent. on the residue of principal allowed: *In re European Central Railway Company* (6).

(1) 2 Ves. 87, 91.
(2) 2 Rep. in Ch. 44.
(3) 2 Dick. 601.
(4) 15 Ves. 479, 495.
(5) 11 Ves. 602.
(6) *Ante*, p. 33.

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Hastings, Q.C., and *Temple Cooke*, for the real representative:—

We contend that this is a fund to be dealt with as a new fund, and that before anything is paid to the next of kin the real estate ought to be recouped.

Glasse, in reply:—

There should not be any such apportionment of the payments in 1792 between principal and interest as is contended for. The payee has a right to attribute. *Sterndale* v. *Hankinson* (1) shews that the *Statute of Limitations* cannot run.

[He also referred to *Creuze* v. *Hunter* (2), *St. John* v. *Boughton* (3), and *Berrington* v. *Evans* (4).]

Judgment.

1877. Jan. 13. The judgment of the Court (*James*, L.J., and *Baggallay*, J.A.), was delivered by BAGGALLAY, J.A., who, after stating the facts, continued:—

On behalf of the Appellants, *L. M. Dyer* and *H. C. Butler*, it has been contended that they are entitled to the relief prayed by their petition; and that, at any rate, they, and such other of the claimants as are similarly circumstanced to themselves, are entitled to be paid the full amounts of the balances and interest claimed by them out of the funds which have arisen from the testator's interest in the *Shadwell Waterworks*, if such funds are sufficient for that purpose, or to share rateably therein if such funds are not sufficient for the payment of principal and interest in full. On behalf of the Appellant, *Thomas John Pitfield*, it has been contended that the Vice-Chancellor ought not to have declared that the simple contract creditors were entitled to be paid the balances due to them, with interest, out of the funds in the said order mentioned, but that the next of kin of the said *C. Pitfield* ought to have been declared entitled thereto; or, at any rate, that interest ought not to have been allowed to the simple contract creditors in respect of the balances due to them, and that the next of kin of the said *C. Pitfield* ought to have been declared entitled to all such of the funds standing to the credit of the cause, from what-

(1) 1 Sim. 393.
(2) 2 Ves. 157.
(3) 9 Sim. 219.
(4) 1 Y. & C. Ex. 434.

ever source derived, as to which no creditors or representatives of creditors should establish their right. The Appellant, Lord *Allington*, did not dispute the rights of the creditors to the benefits conferred upon them by the order of the Vice-Chancellor, but claimed so much (if any) of the surplus of the funds in Court as had arisen from real estate as should remain after satisfying the just claims of the creditors, and also that any eventual surplus of the personal estate should go to recoup what had been paid by the real estate under the former orders. The official solicitor, who appeared as Respondent upon all the appeals, supported the order of the Vice-Chancellor. In the course of the arguments our attention has been directed to a number of orders from time to time made in various matters, the circumstances of which are alleged to have been more or less similar to those at present under consideration; but, inasmuch as, for reasons which will presently be stated, the decisions in those matters do not appear to have been such as we can satisfactorily treat as binding authorities, we propose to deal with the questions now before us as if they were unaffected by authority.

Now, according to the recognised principles upon which the Court of Chancery always acted in the administration of estates, as well real as personal, the decree of the 11th of August, 1748, was equivalent to a judgment against the personal estate, whenever realized, of the deceased debtor, *Charles Pitfield*, in favour of all his creditors who should prove their debts in the cause; and this was extended to the real estate by the decretal order of the 8th of June, 1785. This being so, the order of July, 1792, and the report of August of the same year, are, in our opinion, conclusive as regards the several sums now in Court, which represent moneys appropriated in 1792 to the payment of debts, and which were not so applied. Such moneys were, in fact, ordered by the Court to be paid to the parties named in the report or their representatives, and to them only. It was as much their property as if there had been only one unsatisfied creditor, and the whole had been directed to be paid towards the satisfaction of his debt. The Court of Chancery had not, and this Court has not, any jurisdiction to order the payment to any other person, unless directed or authorized to do so by an Act of Parliament. Nor, when the

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question is fully considered, is there any sound distinction to be drawn between the proceeds of the funds left in Court in 1792 and those which have been since realized from the *Shadwell Waterworks*, other than this, that whereas the funds mentioned in the order of 1792, were appropriated to named creditors, those which have been since realized must, in accordance with a further principle recognised in the administration of assets, be appropriated not only to the same named creditors, or their representatives, but to such further creditors (if any such there are) as have succeeded in proving debts since the date of the former order. As before mentioned, the decree and order of 1748 and 1785 bound not only all the estate realized at the dates of such decree and order respectively, but all such estate as might thereafter be realized. Then, as regards the question of interest, the Court of Chancery has always acted upon the principle that, in the administration of an estate, all such portion of an interest-carrying debt as remains from time to time unpaid, without any neglect or default on the part of the creditor, carries interest after the original rate until payment. Interest must, therefore, be allowed upon the various balances certified by the report of August, 1792, as remaining due to simple contract creditors, but no interest can be allowed upon the amounts of any of the specialty debts mentioned in the first schedule to the report which may have been left in Court by the parties entitled to receive them; the whole amounts due in respect of such specialty debts having been made payable to the parties entitled to them, it was through their own neglect or default that the same were not received. It does not appear that any of the new claims are in respect of sums appropriated to simple contract creditors by the report of 1792, but not received by them; but if any such shall be established, the parties establishing them will, for the like reason, be not entitled to interest except on the balances remaining due to them after such appropriation.

Upon the whole, then, we are of opinion that the declaration contained in the order of the Vice-Chancellor respecting the title to the funds in Court which have arisen from the testator's interest in the *Shadwell Waterworks* is correct. We are further of opinion that he was quite right, upon the materials before him, in not

making any order as regards the funds which respresent the moneys left in Court in 1792; but inasmuch as claims have since been brought forward in respect of specialty debts included in sched. 1 to the report of August, 1792, and alleged to have been not yet paid, provision must be made for the payment out of the last-mentioned funds of the amounts of such claims as may be established.

The fact, certified in the earlier proceedings in the cause, that specialty debts had been paid out of personal estate to an amount very far exceeding the whole value of the real estates, makes it unnecessary at present to draw any distinction between the proceeds of real and personal estate, or between the persons respectively entitled to such several estates. It is extremely improbable that the estate will ever shew a surplus after providing for all the debts of the testator, having regard to the large arrears of interest, and unless that event shall happen, it appears to us that neither the heir-at-law nor the next of kin can ever be entitled to anything.

These observations are sufficient to dispose of the questions under our consideration, but we think it right to express the views which we have taken of the cases which have been cited in the course of the argument. It has been strongly pressed upon us that through a long series of years it has been the uniform practice of the Court of Chancery, in cases similar to the present, where creditors have disappeared, to distribute the funds amongst those only of the creditors who should again appear and establish their claims, and the cases cited have been referred to as evidence of this practice. If we had found that such a uniform practice had existed for a lengthened period, we should have been extremely unwilling to break in upon it, but, having given our best consideration to the numerous cases to which our attention has been directed, we are of opinion that they fail to establish the existence of any such practice as has been alleged. The majority of the cases cited are not reported; but, through the diligence and research of the professional advisers of the parties to these appeals, we have been furnished with copies of the orders made in them and of the other material proceedings.

In some of the cases cited, and which have been much relied

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upon, as, for instance, in *Williamson* v. *Naylor* (1), *In re Cunningham's Trusts*, and *Smith* v. *Smith*, it will be found that the Court simply made a decree or order for carrying into execution certain trusts for the benefit of creditors, and, having directed an inquiry as to who were entitled to the trust funds, eventually made an order for payment to the persons whose titles were certified. There was not in any of these cases any general administration decree operating as a judgment in favour of the creditors. At the most, the orders for payment were only equivalent to the order of July, 1792, in the present case. Had there been any subsequent orders dealing with funds not taken out of Court under the orders for payment, the case might have been different; as it is, it is clear that the cases are of no authority on the present occasion. It is very possible, indeed probable, that in these cases portions of the trust-funds had been distributed amongst larger bodies of creditors before payment of the balance into Court, but this is immaterial; there was no judgment except as regards the moneys paid into Court.

Again, the facts of the case of *Wild* v. *Banning* (2) hardly support the marginal note, for though the Master of the Rolls intimated an opinion that the creditors who ultimately established their claims would be entitled to divide the funds, he only decided that the trustee was not entitled to the unreceived funds, and he directed an inquiry as to who were entitled to them.

In the cases of *Stuart* v. *Tichborne* and *Stables* v. *Aitcheson* the circumstances resembled those of the present case so far as the funds left in Court in 1792 are concerned. In the year 1799, in the former case, and in the year 1827, in the latter, orders had been made for the distribution of certain funds rateably amongst certain named creditors, and portions of the apportioned funds which had not been taken out of Court pursuant to such orders were in May, 1873, in the former case, and in July, 1873, in the latter, ordered to be apportioned between those creditors only who came in and established their claims in 1873. But these orders were made by Vice-Chancellor *Malins* before his attention had been directed to the decision of Lord *Selborne* in *Alderson* v. *Petrie*, to which reference will presently be made (indeed *Alderson*

(1) 3 Y. & C. Ex. 208. (2) Law Rep. 2 Eq. 577.

v. *Petrie* was not decided until after the order was made in *Stuart* v. *Tichborne*); and, in the present case, the Vice-Chancellor dissented from the views which he had taken in those two cases and in the case of *Newton* v. *Bennett*, to which attention has also been directed, and adopted that upon which Lord *Selborne* acted in *Alderson* v. *Petrie*. And here it may be noted that, in most of the cases cited, though the original suits were instituted many years ago, the orders relied upon are of comparatively recent date. But, whilst the orders relied upon by the Appellants fail to shew any lengthened uniform practice in the direction contended for by them, the case of *Alderson* v. *Petrie*, in its details, singularly illustrates the course, which, in our opinion, ought to be adopted in like cases, and as the details of this case have not as yet been fully reported, it may be convenient to refer to them.

The suit of *Alderson* v. *Petrie* was instituted at the close of the last century under the following circumstances: On the 1st of October, 1785, two indentures, bearing that date, had been executed for the benefit of the separate creditors of *William Price* and the joint creditors of *William Price* and *Thomas Harris*. Under the trusts of those indentures, funds of considerable amount came to the hands of the trustees and were applied in payment of dividends, but, in consequence of the difficulties which the trustees experienced in distinguishing the separate from the joint assets, the suit was instituted for the administration of the trusts of both deeds, and by the decree made by the Master of the Rolls on the 20th of February, 1801, accounts were directed as to the moneys received by the trustees and inquiries as to the debts due to the creditors.

By his report made pursuant to the decree, and bearing date the 1st of August, 1804, the Master stated that he had taken an account of the moneys come to the hands of the trustees, but that he was unable to ascertain the sources from which such moneys had been derived; and in the schedules to the report he set forth lists of the creditors who had proved their debts and the amounts due to them respectively. When the cause came on upon further consideration the Court intimated that no distribution of the funds could be made unless the creditors could come to some agreement upon the subject, and thereupon an agreement, dated the 2nd

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of October, 1804, was executed by the trustees and by all the creditors who had proved their debts under the decree, to the effect that the trust funds, from whatever source derived, should be distributed rateably between all the separate and joint creditors. Subsequently to the date of the report three other creditors proved their debts, and by an order made by the Master of the Rolls on the 28th of May, 1805, upon a petition stating these circumstances, it was ordered that, after payment of the costs thereby directed to be taxed, the Master should divide and apportion the residue of the funds then in Court, and such other money as should be paid into Court, amongst the several creditors whose names were set forth in the 1st and 2nd schedules to the report, in proportion to their debts as set forth in the schedules, and the three creditors aforesaid, in proportion to the debts so proved by them. Now, it was by this order of the 28th of May, 1805, that the rights of the parties were determined, and it will be observed that it determined the parties who were to share in all the trust funds, as well those then in Court as those which might thereafter be brought into Court; being equivalent, therefore, to a decree for administration in due course. Accordingly, further funds having been brought into Court in the interval between the date of the order and the apportionment by the Master, those funds were included in the apportionment, and it was so certified by the report of the Master bearing date the 22nd of August, 1805.

Further remittances coming to the hands of the trustees sufficient to pay a further dividend of 8*d.* in the pound, they, out of Court, paid dividends of that amount to most, but not all, of the creditors, and upon the petition of the surviving trustee that he might be at liberty to pay into Court the amount of the unpaid dividends, and of further remittances which had subsequently been received, it was, by an order dated the 21st of December, 1812, ordered, that out of such sum as should be paid into Court by the Petitioner the dividend of 8*d* in the pound should be paid to such of the creditors as had not received it, and that the residue of such sum, after payment of costs, should be divided amongst the several creditors whose names were set forth in the schedule to the report of the 22nd of August, 1805, in proportion to their debts as set forth in such schedule.

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The Master to whom the said cause was referred made his report, dated the 6th of May, 1814, and thereby found that the unpaid dividends of 8*d.* in the pound amounted in the aggregate to £416 9*s.* 4*d.*, and were payable to the creditors mentioned in the schedule to his report, and he also found that further sums had been paid into Court to the credit of the cause since the date of the said order, and that, after payment of costs, the fund divisible among the creditors named in the schedule to the report of the 22nd of August, 1805, amounted to the sum of £4144 4*s.*, and that he had apportioned the same amongst all the creditors named in the said report.

The sums so apportioned were paid to many of the creditors named in the report, but others of such creditors did not receive the amounts to which they were entitled. Nothing further was done in the suit until July, 1872, when a petition was presented to the Master of the Rolls by the representative of one of the creditors named in the schedules to the report of 1805, praying an inquiry who were entitled to the fund then standing to the credit of the cause, which amounted to £905 5*s.* 9*d.*, and represented the apportioned sums which had not been taken out of Court. An order was made to the effect prayed, and the representatives of several others of the creditors named in the schedule, some of whom had not received the sums apportioned to them in 1814, came in under it, and they, as well as the Petitioner, having established their claims in Chambers, contended that they were entitled to receive out of the fund in Court, not only the sums apportioned to them and unreceived, but also so much more as would make up to them 20*s.* in the pound with interest, the fund in Court being more than sufficient for that purpose. The matter was adjourned into Court, and was heard by Lord *Selborne* in June, 1873, when his Lordship held that all the creditors named in the schedule had acquired a vested interest in any funds which subsequently became distributable, and that only the proportion of the fund which the debts of those who claimed payment at the subsequent period bore to the entire debts could be paid out, and that the rest must be retained in Court.

The principle on which that decision was based is, in our judgment, unimpeachably sound, and we must act on the same principle

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in the case before us. The creditors who have been discovered will get everything to which they became entitled under the decrees and orders of the Court, and we can give them no more. And the remainder of the fund which belonged, and belongs absolutely, to the other creditors, judicially ascertained and declared, must remain until some persons entitled come forward to claim it. If *A.* chooses to leave his money in Court it does not thereby become the property of *B.* The fact that *A.* and *B.* were both creditors of *C.* can make no difference; still less if *B.* claims beneficially under *C.*, an insolvent debtor.

Having regard to the benefit which the funds in Court have derived from the prosecution of the inquiries in this case, we think that the costs as prayed by the Petitioner and the costs of the appeals should be paid rateably out of the two funds.

Solicitors: *Ewbank & Partington; Meynell & Pemberton; Lovell, Son, & Pitfield.*

C. A. 1876 V.-C. M. *June* 17. C. A. 1877 *Jan.* 13, 15.

In re UNIVERSAL NON-TARIFF FIRE INSURANCE COMPANY.

RITSO'S CASE.

Company—Liability of Directors—Agreement to take Shares.

R., the chairman of the board of directors of a company in which he held fifty shares, signed a letter of application for 450 more, striking out the reference to the payment of the deposit which was required on application for shares. There was some evidence to shew that this application was made in pursuance of a previous promise by *R.* to become a holder of 500 shares, and that on the faith of this promise he had been elected chairman.

No notice was taken of the application till after seven months, when at a board meeting it was proposed and seconded that 450 shares should be allotted to *R.* *R.*, who was present, handed in a letter withdrawing his application, and deposed that he had previously withdrawn it verbally. There was no proper evidence that the resolution to allot shares to *R.* had been carried, but a letter of allotment was sent him on the following day. The company was at this time in a hopeless state, and a resolution for winding it up was passed a fortnight afterwards:—

Held, by *Malins*, V.C., that, although if *R.* had been an outside applicant the delay and the informality of the allotment would have exempted him from liability as to the 450 shares, he could not avail himself of the delay

and informality which he, as chairman of the board of directors, was bound to have prevented, and that he was a contributory in respect of those shares.

Held, on appeal, that the offer by *R.* to take shares was not shewn to have been accepted by the company before it was withdrawn by him, and that he was not liable in respect of the 450 shares.

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RITSO'S CASE.

Statement.

THIS was an adjourned summons upon an application by *Ritso* that his name might be removed from the list of contributories of the *Universal Non-Tariff Fire Insurance Company, Limited*, in respect of 450 shares.

The company was registered on the 29th of March, 1871, with a nominal capital of £250,000, in 100,000 shares of £2 10*s.* each, but no more than 1119 were ever taken. *Ritso* was a subscriber to the memorandum of association for one share, and was one of the first directors named in the articles. The qualification for a director was the holding fifty shares. *Ritso* applied for fifty shares, and at a board meeting of the 24th of May, 1871, it was ordered that the shares which had been applied for should be allotted. At another board meeting, on the 21st of June, he was elected chairman of the board. The fifty shares were issued to him on the 21st of June, and were registered in his name. He paid the deposit of 5*s.* per share, which was required to be paid on application, and he duly paid all subsequent calls that were made in respect of these shares until they were paid up in full, and as to them no question arose.

The liquidator adduced evidence to the effect that *Ritso* had before and after the registration of the company requested several persons to take shares, representing himself as going to take 500 shares—that, in order to induce the directors to commence business, which they did in June, 1871, with only 1119 shares taken up, he represented that he was going to take more shares, and that on various occasions he stated to the board that he was going to take 450 more shares. The liquidator's evidence also went to shew that *Ritso* was elected chairman on the faith of his being thus about to become largely interested in the company. *Ritso* contradicted all these statements. It was, however, undisputed that at a meeting of the directors on the 13th of February, 1872, another director pressed *Ritso* to take 450 more shares, insisting that he had promised to do so, and that *Ritso* either

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denied the promise or stated it to have been conditional on the company's getting into a sound condition; but it was disputed whether he did not subsequently at the same meeting admit the promise. Subsequently *Ritso* signed an application, dated the 5th of March, 1872, for 450 shares. This application was on one of the common printed forms, but in filling it up *Ritso* struck out the statement as to payment of the deposit of 5*s.* per share, and he never paid it. He stated, on cross-examination, that he struck out the above statement to indicate that his application for shares was not absolute, but conditional, the condition, as he alleged, being that a certain number of shares in the company should be taken up. On the other hand, the manager of the company deposed that at the meeting of the 13th of February, 1872, *Ritso* said that he would take the 450 shares, but that he thought he ought to be allowed a liberal commission on them. The manager went on to say—"Admiral *Elliott* then asked what commission, and Mr. *Ritso* said he thought he ought to be allowed 5*s.* a share. I was then requested to prepare a paper for Mr. *Ritso's* signature, but Mr. *Ritso* refused then to sign, on the ground that it was pressing him too hard, and it was left with Mr. *Ritso* to arrange the consideration with me and complete the application by filling up the necessary form. I subsequently pressed Mr. *Ritso* to fill up the form, and he filled up the form dated 5 March, 1872." He went on to say that the striking out of the 5*s.* was acquiesced in, because the amount of commission which *Ritso* was to receive had not been settled.

Matters remained in this state till a board meeting on the 14th of October, 1872. The minute of this meeting, so far as related to the present subject, was as follows:—

"Monday, 14 Oct. 1872. Present, *F. C. G. Ritso*, in the chair. Mr. *White*, Mr. *Stent*. It was proposed by Mr. *Stent*, and seconded by Mr. *White*, that the 450 shares applied for by Mr. *Ritso* be allotted."

This was the last board meeting ever held, and the minutes were never signed by the chairman. *Ritso* deposed that he protested against the allotment on the ground that he had long ago verbally withdrawn his offer. It was denied on the other side that he did so protest, but it was undisputed that before he left

Statement.

the room, though after the other two directors had left, he wrote and handed to the manager a letter formally withdrawing his application for shares. On the following day the manager sent him a letter of allotment for the 450 shares.

On the 31st of October, 1872, the company passed a resolution to wind up, which was confirmed on the 15th of November, and registered on the 3rd of December, 1872. On the 20th of December an order was made for continuing the winding-up under supervision.

The liquidator having included *Ritso's* name in the list of contributories in respect of the 450 shares, *Ritso* applied to remove it, and the summons came on to be heard before Vice-Chancellor *Malins* on the 17th of June, 1876.

Argument.

Higgins, Q.C., and *Edmund James*, for Mr. *Ritso*:—

First, we say that there was no unconditional application for the 450 shares by Mr. *Ritso*, since there was no offer to pay the requisite deposit, and no deposit was ever paid upon them. Secondly, there is evidence of a verbal withdrawal of the application by Mr. *Ritso* before allotment, there having been no allotment whatever before the 14th of October. Thirdly, there was no proper allotment ever made to Mr. *Ritso*: *Reidpaths' Case* (1); *Harris' Case* (2); *Gunn's Case* (3); *Bartlett's Case* (4); in which last case the person applying for shares was a director. An implied contract by a director only applies to the number of shares he is bound to take as his qualification, as in *Brown's Case* (5) and *Ex parte Fletcher* (6), unless he agrees to take a certain number of other shares, as in *Davies' Case* (7). Here no agreement to take the shares is proved. The suggestion in the evidence that others were led into being shareholders by reason of his promise to take more shares is not sustained. A representation on the faith of which others have acted must be clear and unambiguous to fix the party making it with liability: *Bartlett's Case*. The fourth point is, that no allotment was made till more than seven months after the application for shares. This delay is sufficient to exempt

(1) Law Rep. 11 Eq. 86.
(2) Ibid. 7 Ch. 587.
(3) Ibid. 3 Ch, 40.
(4) 17 W. R. 131.
(5) Law Rep. 9 Ch. 102.
(6) 37 L. J. (Ch.) 49.
(7) 41 L. J. (Ch.) 659.

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Mr. *Ritso* from liability: *Ramsgate Victoria Hotel Company* v. *Montefiore* (1); *Ex parte Bloxam* (2). Then we say that this allotment was made on the eve of the company being wound up when they knew that they were in a state of insolvency, and nothing could prevent the company from breaking up.

Glasse, Q.C., and *Whitehorne*, for the liquidator, were not called upon.

Judgment, V.-C. M.

MALINS, V.C.:—

The question in this case is a very important one, as affecting the duties of directors of companies. [His Lordship, having stated the facts as already set forth, continued:—]

I accede to the contention that if Mr. *Ritso* had been a mere outside applicant for those 450 shares, and not in the position with respect to the company that he held, his application for the shares being in March, and nothing done in consequence till seven months afterwards, that would, under the circumstances of the case, have rendered the allotment ineffectual, and not binding on him. The case of the *Ramsgate Victoria Hotel Company* v. *Montefiore* would have been conclusive upon that subject. That view is also supported by the minutes of the company, which do not shew that the shares were actually allotted. There is no record of any such resolution, but only that it was proposed they should be allotted. If, therefore, Mr. *Ritso* were to be treated as a merely ordinary outside applicant for shares in the company, he could not be liable for the 450 shares, and he would have been entitled to a decision in his favour. But it turns out from the evidence that *Ritso* from the beginning was active in forming the company, and told several of his friends who joined the company that he should be a holder of 500 shares in it—that is to say, 450 in addition to his other fifty shares. That is proved by the secretary of the company, and corroborated by more than one witness, and I should not have been able to decide this case as I intend to do had there not been such corroboration. The probabilities of the case are in accordance with the evidence. Why was Mr. *Ritso* to be the chairman? Because he said that he was a holder of 500 shares,

(1) Law Rep. 1 Ex. 109. (2) 33 L. J. (Ch.) 574.

and was, therefore, the largest shareholder in the company, and as such had a claim to the office and its emoluments, amounting, as it was then considered, to about £400 a year. He said himself that he did not know much about the business of an insurance office, and no doubt £400 a year was a sum well worthy of his consideration. He thought favourably of the company; and that by taking 500 shares he was making a profitable investment, and his position of chairman was one coveted by him. There was nothing, therefore, unreasonable or improbable in his having originally agreed to take the 500 shares. But the witnesses distinctly state that he did agree to take that number of shares, and that he was on that account elected chairman of the company. Then the evidence goes to shew that at first he took no more than his fifty qualification shares, as to which there is now no question. But the company got into difficulties, and could not pay its policies, and Mr. *Ritso* was pressed by his brother directors to fulfil his engagement to take up all the 500 shares. It is shewn that Admiral *Elliott*, who was also a director of the company, closely pressed *Ritso* to take the shares. He accordingly, in March, 1872, signed an application for the 450 shares. It was said that that application, by omitting a reference to the payment of the deposit on the shares, which the form prescribed by the articles of association required, was ineffectual, but that omission is of no importance, because the application for the shares was none the less made, and it was Mr. *Ritso's* duty as chairman to see that the application was perfectly correct. Then he says that on the 19th of March, 1872, he verbally withdrew that application; but in that allegation he is positively contradicted by all the other witnesses, and even by himself; for immediately after a meeting of the company in October, 1872, he wrote to the secretary thus:—"I give you notice that I withdraw my application for the shares, no allotment having been made." If he had really withdrawn the application previously, he would simply have reminded the secretary that he had done so.

I think, therefore, that Mr. *Ritso* must be under a mistaken notion when he says he had withdrawn his application on the 19th of March. It was his duty as chairman to see that all his shares were properly taken up, and he cannot be permitted to take

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advantage of his own wrong in not making a proper allotment. No doubt he signed the application for them in March, 1872, under the pressure of some force which he felt he could not resist; but, having done so, he should, as chairman, have seen the application duly carried out. I am satisfied, from the evidence in the case, that Mr. *Ritso* promised to take 500 shares in the first instance; that he had no knowledge of insurance business, and had no qualification to be elected chairman, except the fact of his holding a large number of shares. I think that he was elected upon the faith of his own statement that he was the holder of 500 shares, and that he subsequently signed the written application for the 450 shares. That being so, and if I am satisfied that he did agree to take the shares, and that he was elected chairman on the faith of his being the holder of 500 shares, is he, or is he not, to be treated as a holder of those shares in the company? The 23rd section of the *Companies Act*, 1862, defines what a member of the company is. It says that "the subscribers to the memorandum of association of any company under that Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of shareholders; and every other person who has agreed to become a member of a company under that Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." This company is one registered under that Act, and Mr. *Ritso* agreed to become a member of the company. He had, moreover, agreed to take shares for a valuable consideration; and while I admit the correctness of the principles laid down in the cases referred to on Mr. *Ritso's* behalf, still I think the present case is really governed by that of *Davies' Case* (1). There *Davies*, for a good consideration, entered into an arrangement with a company, part of which was that he and his partner should take 250 shares. He applied for fifty shares, and paid the deposit on them. No allotment of shares in the company was ever made, and his name was never entered upon any register of members. The company was afterwards wound up. I, in the first instance, and then the Court of Appeal, in affirmation of my decision, held that *Davies*

(1) 41 L. J. (Ch.) 659. 20 W.R. 578: W.N. (1872) 66

was rightly placed on the list of contributories. In the present case, I say it is clear that Mr. *Ritso* did agree to take 500 shares in the company; that he was elected a chairman in consideration of that agreement; and that although no allotment might, in strictness, be said to have been made to him of the 450 shares, still, having regard to his agreement to take them, and his position with reference to the company, he must be held liable for the 450 shares, as well as the fifty shares. His name must, therefore, be placed on the list of the contributories for 450 shares beyond the fifty already held by him. This summons must be dismissed, and he must pay all the costs of it, both in Chambers and in Court.

C. A. 1877 RITSO'S CASE. Judgment, V.-C. M.

Ritso appealed from this decision. The appeal was heard on the 13th and 15th of January, 1877.

C. A.

Higgins, Q.C., and *Edmund James*, for the Appellant, relied on the same grounds as in the Court below.

Argument.

Glasse, Q.C., and *Whitehorne*, for the liquidator:—

We admit that an agreement between the Appellant and the company that he should take shares must be proved, and if his letter of application is to be treated as an ordinary application there may be difficulty in shewing that it was acceded to on the part of the company. We say, however, that it is not to be so regarded. *Ritso* had verbally promised to take shares. The officers of the company press him to take the shares, and he then signs the letter, which in fact was the acceptance of an offer made to him by the company, and constituted a contract: *Bloxam's Case* (1); *Bird's Case* (2); *Davies' Case* (3); *In re Valparaiso Waterworks Company* (4). The case of *Ex parte Roney* (5) is very like the present.

JAMES, L.J.:—

Judgment, C. A. James, L.J.

I am of opinion that the order of the Vice-Chancellor cannot be sustained, and that Mr. *Ritso's* co-directors, whatever their wishes may be, have not succeeded in fixing him with the 450 shares in dispute. It is clear that there was no regular allotment of them,

(1) 4 D. J. & S. 447. (3) 41 L. J. (Ch.) 659.
(2) Ibid. 200. (4) 26 L. T. (N.S.) 650.
(5) 12 W. R. 814, 994.

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udgment, C. A. James, L.J.

nor any such application for them as was usually made. At the meeting of the 13th of February, 1872, it was admitted that there was then no binding agreement to take shares, for there was a struggle as to *Ritso's* fulfilling a verbal promise from which he was trying to escape. I admit that a formal agreement is not necessary; if there is anything containing the terms, "We accept you as a shareholder in respect of 450 shares," and "I agree to become a shareholder in respect of 450 shares," that will be enough. If the substance of an agreement is made out, the form is not material. But here it has to be made out that there was any such agreement. This gentleman was anxious to get people to join the company, and he represented to various persons, in order to induce them to take shares, that he himself was going to become a large shareholder. That was a statement of his intention to become such, and this is all that took place until he signed the paper of application for shares on the 5th of March, 1872. Up to that time clearly nothing had occurred which bound the company to give him, or him to accept, the 450 shares. There might have been representations which would give to third parties a right of action; but up to that time there was no agreement between *Ritso* and the company as to these shares. He was called upon to fulfil his verbal promise, to satisfy the honourable obligation he was under, and he accordingly signed a paper applying for 450 shares, but he signed it after striking out the clause as to payment of the deposit. He deposes that he struck it out to shew that his application was not absolute but conditional, though certainly this was a singular way of denoting a condition. The application was not immediately followed by an allotment of shares. Why it was not is not clear on the evidence, but probably the evidence of the liquidator furnishes the reason—that Mr. *Ritso* had asked for a commission on these shares, and that the matter stood over to see whether the directors would agree to this. Whatever the reason may have been, the application was not acceded to until a subsequent meeting, by which time it had been withdrawn, if *Ritso* had a right to withdraw it. As it had not been accepted, he had, in my judgment, a right to withdraw it, and cannot be held to have entered into a concluded agreement to take these shares.

C. A.
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RITSO'S CASE.

BAGGALLAY, J.A.:— Judgment, C. A. Baggallay, J.A.

In this case the counsel for the liquidator admitted that if *Ritso's* application for shares was treated as an ordinary application they had no case, as the application was withdrawn before it had been acceded to. They contended, however, that this was not an ordinary application, but that, having been made in consequence of a previous verbal agreement to take shares, it was, in fact, an acceptance in writing by the company of an offer previously made. There is some evidence to support this; but, on the whole, I do not think it the true version of the transaction. *Ritso* was chairman in 1871. If there was an agreement by him to take shares, and if he was appointed chairman on the faith of it, why was it not fulfilled? It is said that in the following year, after some dispute, he signed what is called an agreement to take shares by way of ratification of his former parol agreement. Here, again, the question arises, Why, then, were not the shares allotted? There is evidence that a question was under discussion as to allowing him a commission on the shares; and upon the whole of the evidence I am satisfied that there never was an unconditional agreement by him to take these shares, and that his application was merely an application which was never accepted before its withdrawal.

BRAMWELL, J.A.:— Bramwell, J.A.

There is no doubt that *Ritso* held out an expectation that he would take 500 shares, perhaps he even promised that he would take them; but in considering whether he bound himself to take them, we must look to what the parties did. If he was bound to take 500 shares, why was he allowed to take fifty only? Then, on complaints being made, he signs an application for shares. And whether his version of the transaction or that of the liquidator be correct, it is, at all events, clear that his offer was never acted upon until it had been withdrawn. In cases of this kind it would be very mischievous to make binding contracts out of loose talk.

Solicitors: *H. T. Gastrell; Wilkins, Blyth, & Fanshawe.*

C. A.
1877
Feb. 2.

JUDD *v.* GREEN.

[1873 J. 36.]

Practice—Security for Costs—Dismissal of Appeal for want of Prosecution—Rules of Court, 1875, *Order* LVIII., *r.* 15.

An Appellant who had been ordered to give security for the costs of an appeal from a decree failed to do so for nine months. At the end of that time, which was more than a year after the decree, the Respondent moved to have the appeal dismissed with costs for want of prosecution, and the delay not being explained the Court ordered accordingly.

Statement.

IN this case, the Plaintiff having given notice of appeal from the decree dated the 12th of January, 1876, an order was made by the Court of Appeal on the 25th of April, 1876, on motion by the several Defendants, that the Plaintiff should procure some sufficient person in his behalf to give security, according to the course of the Court, by bond to the Clerks of Records and Writs, in the penalty of £150, to answer the costs of the appeal, with an option to the Plaintiff, in lieu of such security, to pay £150 into Court to the credit of the cause, "Security for costs of appeal;" and that the Plaintiff's appeal should not be placed in the paper until fourteen days after such security had been given or such payment into Court made, and notice thereof given to the Defendants.

The Plaintiff not having given any bond, nor made any payment into Court in pursuance of the above order, one of the Defendants, on the 27th of January, 1877, served notice of motion that the appeal might be dismissed for want of prosecution, and that the Plaintiff might be ordered to pay the applicant his costs of the appeal, including the costs of his application for security and his costs of the present application. The Plaintiff's delay was not accounted for by affidavit.

Argument.

W. S. Owen, for the application.

Kekewich, and *W. Barber*, for the other Defendants.

Everitt, for the Plaintiff, stated his instructions to be that the

(1) See 1 A. (1875) P. II. 363.

Plaintiff was endeavouring to raise the £150, and would be able to give security if further time were allowed.

C. A. 1877 JUDD v. GREEN.

THE COURT (*James*, L.J., and *Brett* and *Amphlett*, JJ.A.) made an order according to the terms of the notice of motion.

Solicitors: *Vallance & Vallance; Trinders & Curtis-Hayward; Harper, Broad, and Battcock.*

In re BAILLIE'S TRUSTS.

C. A. 1877 Feb. 16.

Practice—Time for entering Appeal—Order under the Trustee Relief Act—Rules of Court, 1875, *Order* LVIII., *r.* 9.

The time within which an appeal must be brought from an order made under the *Trustee Relief Act* is twenty-one days.

12 L.D. 306
13 Ch.D. 417

Statement.

IN this case a sum of money had been paid into the Court of Chancery under the *Trustee Relief Act*, and invested in the purchase of Consols.

Madame *von Gründler* and her husband, who were residing at *Colberg* in *Prussia*, presented a petition for payment of the fund out of Court to them. On the 17th of December, 1875, Vice-Chancellor *Malins* made an order refusing the prayer of the petition. On the 12th of July, 1876, the Petitioners gave notice of appeal against this order, and the appeal came on to be heard before the Court of Appeal on the 16th of February, 1877.

Argument.

Bristowe, Q.C., and *Everitt*, for the Appellants.

J. Pearson, Q.C., and *Bush*, for the Respondents, took the objection that the appeal was not brought within twenty-one days within Rules of Court, 1875, Order LVIII., rule 9 (1). They referred to

(1) Order LVIII., r. 9: "The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the *Companies Act*, 1862, or any Act amending the same, or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for an appeal from an interlocutory order under rule 15." That is, three weeks.

C. A. 1877

In re BAILLIE'S TRUSTS.

the judgment of *Brett*, J.A., in *In re National Funds Assurance Company* (1).

Argument.

Bristowe, Q.C., and *Everitt*, for the Appellants:—

This appeal is not within the 9th rule. The words "in any other matter" must relate to matters similar to a bankruptcy or winding-up. In the present case the proceedings were commenced under the *Trustee Relief Act* before the Judicature Acts came into operation; and the 2nd section of the *Trustee Relief Act* (10 & 11 Vict. c. 96) provides that every order made upon any petition under the Act "shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the Court." This order must therefore be treated for this purpose as an order made in an action, and as it is a final order between the parties, the time for appealing is one year. The observation of *Brett*, J.A., in *In re National Funds Assurance Company* was only an *obiter dictum*. At all events, the Court has the power of extending the time, which, if necessary, we now ask for.

Judgment.

JAMES, L.J.:—

I think there is no distinction in principle between an order under the *Trustee Relief Act* and one under the *Companies Act*, 1862, as to which it has been already decided that the appeal must be within twenty-one days. But I think this is a case in which special leave for appeal ought to be given.

BAGGALLAY, J.A., and BRAMWELL, J.A., concurred.

The Respondents' counsel having waived the necessity of a formal application for special leave, the appeal was then heard, and at the conclusion of the arguments the Court reversed the Vice-Chancellor's decision, and granted the prayer of the petition.

Solicitors: *Fielder & Sumner; J. P. Theobald.*

(1) 4 Ch. D. 314.

CUMMINS *v.* HERRON.

C. A.
1877
Feb. 20.

[1871 C. 221.]

Practice—Time for Appealing—Interlocutory Order included in Order on Further Consideration—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Where an order on an interlocutory application and an order on further consideration are made at the same time and are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause.

Statement.

THE bill in this case was filed by the owner of a corn-mill to restrain the Defendant, who was the proprietor of a skin-yard and tan-works, from polluting the stream which ran through the Plaintiff's mill, and for recovering compensation in damages for past injury.

At the hearing of the cause an inquiry was directed whether the Plaintiff had sustained any and what damages from the fouling of the stream. After various proceedings in the cause, the Chief Clerk made his certificate, dated the 6th of April, 1876, by which he certified that the Plaintiff was entitled to £200 compensation for the damages sustained by him. The Defendant took out a summons to vary this certificate, and the summons was adjourned into Court and ordered to come on with the further consideration of the cause.

The cause was heard on further consideration on the 15th of May, 1876, when Vice-Chancellor *Hall* made an order, on further consideration and on the summons, to the following effect: "This Court doth not think fit to make any order upon the said application of the Defendant, and doth order that the Defendant pay to the Plaintiff £200, with interest at £5 per cent. from this date. And it is ordered that a perpetual injunction be awarded against the Defendant to restrain him, his workmen, &c., from discharging or permitting to be discharged any refuse or foul water from his skin-yard and tan-works into the brook, &c. And it is ordered that the Defendant do pay to the Plaintiff his costs of the suit, including his costs of the notice for injunction and the costs of the several applications to vary the Chief Clerk's certificate," &c.

C. A. 1877 — CUMMINS v. HERRON.

On the 31st of July, 1876, the Defendant gave notice of appeal from the whole of this order.

On the appeal being opened an objection was made that the appeal from the refusal to vary the Chief Clerk's certificate ought to have been brought within twenty-one days, and was, therefore, now too late under Rules of Court, 1875, Order LVIII., rule 15.

Argument.

Dickinson, Q.C., and *Nalder*, for the Appellants:—

An order made on an application to vary a certificate of the amount of damages payable by the Defendant can hardly be called an interlocutory order, for it determined in effect the whole suit.

[JESSEL, M.R.:—There can be no doubt that such an order is an interlocutory order, whatever its results may have been.]

Assuming that the order would have been interlocutory if standing alone, it is here incorporated in the order on further consideration, and the whole formed one order, and the appeal is from the whole. Therefore a year is allowed for the appeal. It cannot be intended that a person intending to appeal must pick a final order to pieces and appeal from part within twenty-one days and part within a year. The refusal of the application to vary the certificate in the present case concluded the whole matter, and if that stands, it is useless to argue against the injunction. So that, by not appealing against the interlocutory order within twenty-one days, we practically lose our right of appeal against the final order in the suit.

Eddis, Q.C., and *T. L. Wilkinson*, for the Plaintiff, were not called on.

Judgment.

JESSEL, M.R.:—

As regards the appeal from refusal of the application to vary the certificate, the rule is clear that on the refusal of an interlocutory application the time for appeal is twenty-one days from the refusal whether the order is drawn up or not. In this case much more than twenty-one days have elapsed. The only new point is that this refusal to vary the certificate was made in

an order which also contained an order on further consideration, which is a final order. But that makes no difference; although the orders are on the same piece of paper, yet one order is made on the interlocutory application and the other on further consideration. Therefore the appeal from the refusal to vary the certificate is now too late and must fail. As the whole merits of the case were decided by the Chief Clerk's certificate, the appeal from the order on further consideration must also be dismissed with costs.

C. A. 1877 CUMMINS v. HERRON, Judgment.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Wilkins, Blyth, & Fanshawe*, agents for *J. R. Cobb, Brecon*; *Hunt & Sons*, agents for *J. Jay, Hereford.*

Ex parte SHEIL. *In re* LONERGAN.

C. A. 1877 Feb. 22.

Loan to Trader—Interest varying with Profits—Mortgage to secure Loan—Bankruptcy of Borrower—Rights of Trustee—Partnership Law Amendment Act, 1865 (28 & 29 *Vict. c.* 86), *ss.* 1, 5.

A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender of the lease of the house where the business was carried on, and of the goodwill of the business. The trader became bankrupt:—

Held, that the rights of the mortgagee under his mortgage were in no way affected by sect. 5 of the *Partnership Law Amendment Act*, 1865.

Ex parte Macarthur (1) overruled.

11 C.L.D. 375
15 C.L.D. 225

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy. Statement.

Shortly before the 1st of March, 1873, *E. B. Lonergan* purchased the goodwill of the business of a wine merchant, which had been previously carried on under the firm of *Walmsley & Co.* at No. 33, *Mount Street*, and the lease of that house, and commenced carrying on the business there. To enable him to do so, he borrowed £2000 of *Edward Sheil* upon the security of a mortgage of the lease of the house and the goodwill of the business. The mortgage deed was dated the 1st of March, 1873, and by it *Lonergan* covenanted that he would on the 1st of September then next

(1) 40 L. J. (Bkcy.) 86.

C. A. 1877 *Ex parte* SHEIL. *In re* LONERGAN. Statement.

pay to *Sheil* the £2000, together with such a sum in lieu of interest as should be equal to one-half of the net profits of the business from the 1st of March until the 1st of September, 1873, and that, if the £2000, or any part thereof, should remain unpaid after the 1st of September, 1873, *Lonergan* would, so long as the same sum or any part thereof should remain unpaid, pay to *Sheil* on every 1st of March and 1st of September such a sum in lieu of interest as should be equal to one-half of the net profits of the business for the half year then immediately preceding. And *Lonergan* assigned to *Sheil* the leasehold house, No. 33, *Mount Street*, and the goodwill of the business, to hold the leasehold premises for the residue of the term granted by the lease thereof, and to hold the goodwill absolutely, but subject as to both to redemption upon payment by *Lonergan* of the £2000 and also all such sums in lieu of interest as were thereinbefore covenanted to be paid at the times thereinbefore appointed for the payment thereof respectively.

Lonergan carried on the business until February, 1876, when he filed a liquidation petition. On the 20th of March his creditors resolved on a liquidation by arrangement, and appointed *R. E. James* trustee. The trustee entered into a contract to sell the leasehold premises and the goodwill of the business for £1250, and the purchaser paid a deposit. The trustee applied to the Court for an order that, on payment by the purchaser to the trustee of the balance of the purchase-money, *Sheil* might be directed to concur with the trustee in assigning the mortgaged property to the purchaser free and discharged from all claims by *Sheil* in respect of his mortgage, and that, if necessary, he might be directed to deliver up the mortgage deed to the trustee or to the purchaser.

The Registrar refused the application.

The trustee appealed. By his notice of appeal he asked that the Registrar's order might be discharged, and that it might be declared that *Sheil* was not entitled, by virtue of his mortgage or otherwise, to recover any portion of the principal money, profits, or interest expressed to be secured to him thereby, until the claims of the other creditors of *Lonergan* for valuable consideration in money or money's worth had been satisfied, and that proper directions might be given for enabling the sale of the

C. A. 1877 *Ex parte* SHEIL. *In re* LONERGAN.

leasehold premises and goodwill to be completed, and the purchase-money received by the trustee. The notice also stated that the trustee would not insist on the mortgage deed being delivered up by *Sheil*.

Argument.

Bristowe, Q.C., and *Dauney*, for the Appellant:—

The effect of sect. 5 of the *Partnership Law Amendment Act*, 1865 (1), is to postpone the mortgagee to the other creditors, even in respect of his mortgage security. This was expressly decided in *Ex parte Macarthur* (2). The word "recover" is the strongest word which could have been used; if the Registrar's decision is right it will be cut down to "prove."

[JAMES, L.J.:—What is there in the Act to prevent the lender from availing himself of a right of set-off, if he had one, under sect. 39 of the *Bankruptcy Act*, 1869; or what is there to prevent him from foreclosing his mortgage? That would not be "recovering" anything out of the bankrupt's assets.

JESSEL, M.R.:—The Act says nothing about security. Your argument would equally apply to a security given by a third party.]

They referred also to *Ex parte Mills* (3).

De Gex, Q.C., and *Finlay Knight*, for the mortgagee, were not called upon.

Judgment.

JESSEL, M.R.:—

I am of opinion that this appeal must fail. The 5th section of

(1) Sect. 1: "The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

By sect. 5: "In the event of any such trader as aforesaid being adjudged a bankrupt, ... the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan . . . . until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied."

(2) 40 L. J. (Bkcy.) 86.

(3) Law Rep. 8 Ch. 569.

C. A. 1877

Ex parte SHEIL. *In re* LONERGAN.

Judgment.

the Act provides that a person who lends money under the circumstances mentioned in sect. 1 shall, in the event of the borrower being adjudicated a bankrupt, "not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan," in competition with the other *bonâ fide* creditors of the borrower. That is all.

Now the Respondent was a lender of £2000 at a rate of interest varying with the profits. He was to receive an amount of interest equal to half the profits, if any, and consequently the agreement was within the words of the 1st section, and the question we have to decide is whether he, having taken a legal mortgage of a leasehold house in which the business was carried on, which was assigned to him in the regular way for the residue of the term subject to redemption, has lost the benefit of his security so as to be by the 5th section postponed in respect of it to the claims of the other creditors of the mortgagor. There is not a word in the 5th section inflicting any penalty or disability or any confiscation upon him in respect of the mortgage which he has so taken. He is not seeking to recover anything in the shape of money. He only says: "I have or can obtain the legal possession of the house. I have that for a legal term of years. I do not ask to recover anything from the bankrupt or his estate." That being so, it does not appear to me that the section applies to him at all. He still retains the possession of the house, subject to redemption, as before the bankruptcy, and if the trustee in the bankruptcy thinks fit to say, "I will take the house from you," he is at liberty to do so upon the terms of the mortgage deed.

Now we are asked to extend this a penal statute beyond its terms, to make it equivalent to confiscating the property of the mortgagee. To do that would not be to carry out the object of the Legislature but to legislate, which is a thing we ought not to do. There are several instances in which a mortgage debt may be irrecoverable, and in which nevertheless the mortgagor cannot redeem the mortgaged property without paying the amount secured by the mortgage deed. One instance has been already referred to by the Lord Justice in which, although the mortgage debt may be barred, because there has been neither payment nor acknowledgment for upwards of twenty years, yet the mortgagee may be

entitled to recover the estate by reason of the mortgage being of a reversionary estate, and the tenant for life having lived beyond the twenty years, so that, on the dropping of the life, the mortgagee could recover in ejectment, or in an action for the recovery of land, as it is now called. He having recovered the estate, the mortgagor wants to get it from him. Then, though the debt is barred, if he comes to redeem he must pay the debt. Another instance familiar to real property lawyers was where the debt had been extinguished at law by the taking of the debtor's body in execution. Still the mortgagor could not get back the estate without payment of the money secured by the mortgage deed. The right of the mortgagee to keep the estate did not depend upon his right to recover the debt in the action, but the two rights were wholly independent the one of the other. His right was, not to recover the money, but to keep the estate till the money was paid, which is a totally different thing. It appears to me, therefore, that the decision of the Registrar is correct, and that it ought to be affirmed.

JAMES, L.J.:—

I am of the same opinion. I think the word "recover" means recover, and does not mean "retain."

BAGGALLAY, J.A.:—I agree.

Solicitors for Trustee: *Tamplin, Tayler, & Joseph.*
Solicitors for Mortgagee: *Bridges, Sawtell, & Co.*

C. A.

1877

March 1.

Ex parte VINEY. *In re* GILBERT.

Practice—Time for Appealing—Bankruptcy Appeal—Rules of Court, 1875, *Order* LVII., *r.* 2; *Order* LVIII., *rr* 2, 9, 15—*Bankruptcy Rules*, 1870, *r.* 143—*Bankruptcy Order of 26th May*, 1873.

The time for appealing to the Court of Appeal from orders made by the Chief Judge in Bankruptcy is now regulated by the Rules of Court, 1875.

Therefore, in estimating the twenty-one days allowed for appealing, Sundays are not to be excluded, and the material date is, not that of entering the appeal with the Registrar, but that of service of the notice of appeal on the Respondent.

Rule 143 of the Bankruptcy Rules, 1870, and the Bankruptcy Order of the 26th of May, 1873, do not now apply to appeals from the Chief Judge to the Court of Appeal.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

The order appealed from was pronounced on the 29th of November, and by it an application made by *J. D. Viney*, the trustee in the liquidation of *Thomas Gilbert*, was dismissed, and it was ordered that the trustee should pay to the Respondent his costs of the application. On the 23rd of December the trustee's solicitor served a notice of appeal upon the Respondent's solicitors. The appeal had been entered with the Registrar of Appeals on the 22nd of December. The Respondent's solicitors objected that the appeal was too late, and declined to accept service. Personal service of the notice was made on the Respondent on the 28th of December. The appeal now came on for hearing.

Argument.

De Gex, Q.C., and *Finlay*, for the Appellant.

Winslow, Q.C., and *Bardswell*, for the Respondent, objected that the appeal was brought too late: Rules of Court, 1875, Order LVIII., rules 9, 15; Order LVII., rule 2.

De Gex:—

According to rule 143 of the Bankruptcy Rules, 1870, the date of the entry of the appeal is the material date, and by the Bankruptcy Order of the 26th of May, 1873, Sundays are to be ex-

cluded from the computation of the twenty-one days: *Ex parte Hicks* (1). C. A. 1877 *Ex parte* VINEY. *In re* GILBERT.

[JESSEL, M.R.:—By Order LVIII., rule 2, there is no appeal without service of a notice of motion. It is of no use to keep your notice in your pocket. And by Order LVII., rule 2, Sundays are not to be excluded from the computation of time unless the limited time is less than six days.] Argument.

At any rate, the time ought to be extended, as we were misled by being told at the Registrar's office that the Sundays would not be counted.

JESSEL, M.R.:— Judgment.

The appeal is clearly out of time, and I see no ground for extending the time.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitor for Appellant: *J. Edwin Carter.*
Solicitors for Respondent: *Burton, Yeates, & Co.*

Ex parte BAKER. *In re* BELLMAN.

C. A. 1877 *March* 8.

Bill of Exchange—Notice of Dishonour—Bankruptcy of Drawer—Appointment of Trustee—Proof.

It is sufficient for the holder of a dishonoured bill of exchange to give notice of dishonour to the drawer himself, even though before the dishonour he has been adjudicated a bankrupt, and a trustee of his property has been appointed.

The holder of a bill of exchange which was dishonoured after the appointment of a trustee in the bankruptcy of the drawer sent notice of the dishonour to the drawer by post to an address which he had left for some months:—

Held, that, that address being the only one with which the holder was acquainted, the notice was sufficient.

The holder was, therefore, allowed to prove in the bankruptcy in respect of the bill.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy. Statement.

(1) Law Rep. 20 Eq. 143.

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Statement

E. E. Bellman filed a liquidation petition on the 9th of December, 1874. The creditors resolved to accept a composition, but registration of the resolution was refused, and on the 11th of March, 1875, *Bellman* was adjudicated a bankrupt. On the 6th of April *J. W. Baker* was appointed trustee.

Bellman had carried on business as a brewer in partnership with *W. A. Pooley* at the *Oak Brewery, Canning Town,* as *Bellman & Co.* In August, 1874, *Bellman* sold his interest to *C. T. Jones. Jones* afterwards sold his interest to *Pooley,* and in December, 1874, *Pooley* sold the whole of the business to *C. D. Hay.*

The liquidator of the *City and County Bank, Limited,* tendered a proof in the bankruptcy upon seven bills of exchange for £1000 each, dated the 12th of December, 1874, and drawn by *Bellman* as *Bellman & Co.* upon and accepted by *Hay.* The bank had discounted the bills. The bills became due on the 15th of April, 1875, but were dishonoured. On the 16th of April notice of the dishonour was given by the bank by means of a letter signed by the manager, and sent by post addressed to *Bellman & Co.,* at the *Oak Brewery.* At this time the manager of the bank did not know of the appointment of the trustee. The appointment was gazetted on the 20th of April, and formal notice of it was sent to the bank on the 22nd of April. The *Oak Brewery* was entered in the books of the bank as the address of *Bellman & Co.,* and they knew of no other address. *Bellman* had, in fact, never been at the brewery since he had parted with his interest in it.

The trustee rejected the proof. The Registrar ordered it to be admitted. The trustee appealed.

Argument.

De Gex, Q.C., and *R. Vaughan Williams,* for the trustee:—

There is no sufficient proof that notice of dishonour was given to *Bellman.* He had nothing to do with the brewery at that time.

Moreover, the notice ought to have been sent to the trustee. Even before the present *Bankruptcy Act,* there are *dicta* to shew that, after the appointment of an assignee in bankruptcy of a person liable upon a bill of exchange, notice of dishonour ought to have been given to the assignee: *Ex parte Moline* (1); *Ex parte Johnson* (2); *Ex parte Chappel* (3); *Byles* on Bills (4). And

(1) 19 Ves. 216.
(2) 3 Dea. & Ch. 433.
(3) 3 Mont. & A. 490.
(4) 12th Ed. p. 292.

C. A. 1877 *Ex parte* BAKER. *In re* BELLMAN. Argument.

now, under the present law, the bankrupt after the adjudication is not personally liable on the bill; the only right of the holder is to prove against the estate. The trustee alone is interested in the matter, and notice of dishonour ought to be given to him. The theory is, that the acceptor may have assets of the drawer in his hands, but if the drawer is bankrupt those assets form part of the estate.

[MELLISH, L.J.:—The drawer himself might take up the bill and then proceed against the acceptor. It would be a breach of trust for a trustee in bankruptcy to do that.

BAGGALLAY, J.A., referred to *Rohde* v. *Proctor* (1).]

There must be a reasonable notice of dishonour. If the bill-holder did not know of the bankruptcy, notice to the bankrupt would be reasonable, but not when the holder was aware of the bankruptcy.

Roxburgh, Q.C., and *Finlay Knight*, for the liquidator, were not called upon.

Judgment. James, L.J.

JAMES, L.J.:—

No case has been cited to us in which it has been actually decided that notice of dishonour must be given to the assignees of a bankrupt drawer of a bill of exchange.

Apparently, there are two or three *dicta* which seem to imply that, and it is said in Mr. Justice *Byles'* book that "perhaps the notice ought to be given to the assignees." That is the utmost. It is very odd, considering the thousands (I may say millions) of bills of exchange which must have been the subject of proof in this country, that there never has been a decision that the holder of a dishonoured bill of exchange must give notice of dishonour to the assignees of the bankrupt drawer to entitle him to prove against the estate. The absence of any decision of that kind goes very far indeed to shew that that has never been supposed to be the law. What we have to consider is, whether we ought now, by reason of the change in the bankruptcy law, to lay down for the first time that the notice must be given to the trustee. I

(1) 4 B. & C. 517.

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think that the present case shews how monstrously hard and unjust any such rule would be. Here is a joint stock bank which receives in the course of its business a bill with three or four names upon it. The acceptor does not honour the bill, and the officer of the bank has to give notice to the other persons liable. He gives notice at the business addresses or the residence addresses of the indorsers and the drawer whose names he finds upon the bill. Can it be said that the bank ought to keep a register of every one whose name is upon the bill, so that they may be able to say, "So and so became bankrupt the other day, and we must give notice to his trustee." It seems to me that would make the transaction of business of this kind very difficult and inconvenient, and would be most unreasonable. It does not appear to me that any good reason can be suggested why the holder of a bill should give notice of dishonour to any one but the persons whose names he finds upon the bill. Therefore I think this proof has been rightly admitted.

Mellish, L.J. MELLISH, L.J.:—

I am of the same opinion. I agree that it has not hitherto been decided what is, under these particular circumstances, a sufficient notice of dishonour. The only rule is that there must be a reasonable notice of dishonour. The cases shew that the circumstance that the drawer has become bankrupt is not a sufficient excuse for giving no notice of dishonour. Notice of dishonour must be given. The question is, must the notice, after the appointment of a trustee, be given to him or to the bankrupt, or may it be given to either of them? I agree with Lord Justice *James* that if we were to lay down the rule that the notice must be given to the trustee, we should be imposing a very great burden on persons who deal with bills in the ordinary course of business, and the consequence would be that many just proofs would be rendered impracticable. It would be constantly found that notice of dishonour had not been given to the proper persons. Of course a joint stock bank must have some officer or clerk whose duty it is to give the notice of dishonour. As soon as the bill has been presented and dishonoured he refers to the bill to see who is the drawer and who are the indorsers, and he finds out what their

addresses are and gives the notice at those addresses. That is the ordinary course. But if we were to say that that is not sufficient, but that he ought to inquire as to each of those persons whether he has become bankrupt, and, if so, that he must find out who is his trustee and where he lives, we should impose a very great burden, and should be putting a great difficulty in the way of recovering just debts without any reason, because I do not believe the trustee would suffer any inconvenience or loss from the notice of dishonour being given to the bankrupt instead of to him. I think, also, that it was sufficient for the bank to send the notice to the *Oak Brewery*, because it was the only address they knew. The bills themselves were only dated "*London*." The bank had that address in their book, and they sent the notice there. I think that the appeal must be dismissed.

BAGGALLAY, J.A.:—

I am of the same opinion, and for the same reasons.

Solicitors for Trustee: *Harper, Broad, & Battcock.*
Solicitors for Liquidator: *Janson, Cobb, & Pearson.*

M. R.
1876
Dec. 9.

CHAPMAN *v.* CHAPMAN.

[1876 C. 308.]

Will—"Money, Cattle, Farming Implements, &c."—Ejusdem generis—Blank Gift—General Residuary Gift.

A testator directed his freehold estate to be sold, and his debts to be paid by his widow, his sole executrix. He then bequeathed to her "all my money, cattle, farming implements, &c., she paying my brother *J. C.* the sum of , and my brother *L. C.* the sum of ":—

Held, that the widow was entitled to the whole of the testator's property after payment of his debts, and funeral and testamentary expenses.

Statement.

THOMAS CHAPMAN, yeoman, who died in February, 1876, made his will on the 14th of October, 1875, as follows:—

"I, *Thomas Chapman*, do wish to write my last will and testament.

"I direct that my estate called *Bark House* be sold after my decease, and all my just debts be paid by my wife *Lydia Chapman*, the sole executrix of my will.

"To her I leave all my money, cattle, farming implements, &c., she paying my brother *James Chapman* the sum of to him or his heirs: to my brother *Lawrence Chapman* the sum of to him or his heirs."

The testator's real estate at the time of his death consisted of a farm, partly freehold and partly customary freehold, called *Bark House Farm*. His personal estate, consisting of cash, farming live and dead stock and furniture, was insufficient for payment of his debts and funeral and testamentary expenses.

This was a special case filed by the testator's widow, *Lydia Chapman*, against his brother and heir-at-law, *James Chapman*, to obtain the opinion of the Court upon the construction of the will; the only question calling for a report being, whether the farming live and dead stock and furniture of the testator, and the surplus proceeds of the sale of the *Bark House Farm*, after payment of his debts and funeral and testamentary expenses, were comprised in the gift to his widow.

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CHAPMAN v. CHAPMAN.
Argument.

Chitty, Q.C., and *Caldecott*, for the Plaintiff:—

We submit that the expression "&c." is equivalent to "all my other property," and is therefore sufficient to pass the whole of the general residue. In *Hodgson* v. *Jex* (1) your Lordship held that a gift of "all my furniture, plate, linen, and other effects" passed the whole of the residuary personal estate, and that the enumeration of different items before the words "and other effects" did not cut down the natural meaning of those words.

Bagshawe, Q.C., and *W. Barber*, for the Defendant:—

The expression "&c." is not sufficient to pass the general residue; it must be confined to things *ejusdem generis*, its meaning being "and all other things like the preceding": *Newman* v. *Newman* (2); *Barnaby* v. *Tassell* (3); *Jarman* on Wills (4).

Judgment.

JESSEL, M.R.:—

I am of opinion that this testator has not died intestate as to any portion of his property, but has effectually given all his property to his wife. After directing his *Bark House* estate to be sold, he directs that his debts shall be paid by his wife. How is she to pay them? If she is to pay them out of his property, then plainly she must take his property. Looking at the whole of the will, what the testator means is that she is to take everything he has in the world, she paying his debts and legacies. He has apparently made his own will, and though the words he has used are not artistic, still I think they lead to only one possible conclusion, namely, that he intended to make his wife his universal residuary legatee, and I so decide.

Solicitor for Plaintiff: *R. T. Jarvis*, agent for *J. R. Picard, Kirkby Lonsdale.*

Solicitors for Defendant: *Ridsdale, Craddock, & Ridsdale*, agents for *W. Hartley, Settle.*

(1) 2 Ch. D. 122.
(2) 26 Beav. 220.
(3) Law Rep. 11 Eq. 363.
(4) 3rd Ed. vol. i. p. 721, n.

4 Jur. N.S. 1030

M. R.
1876
Dec. 16, 18.

In re COOPER AND ALLEN'S CONTRACT FOR SALE TO HARLECH.

[1876 C. 366.]

Vendor and Purchaser—Mortgagee's Power of Sale—Trustee and Cestui que Trust—Selling Trust Property with other Property—Apportionment of Purchase-money—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 14, 15, 20, 33, 38—*Mortgages of Life Estate and Remainder before Act, and Sale by Mortgagees after—Mortgagee Agent for Mortgagor—"Succession"—Liability to Duty—"New Succession" created by Purchaser—"Alienation not conferring new Succession"—Duty Payable on last Succession—Double Duty—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

In 1831, under the will and upon the death of a testator, his nephew *A.* became tenant for life, and *A.'s* eldest son, *B.*, tenant in tail of a freehold estate, subject to an outstanding legal mortgage in fee. In 1849 *A.* mortgaged his equitable life estate to certain persons, and in 1852, *B.*, having previously barred his equitable estate tail, mortgaged his equitable remainder in fee to the same persons, each mortgage being for a distinct sum, and containing the usual power of sale. Various transfers of the mortgages from father and son took place, in the course of which, subsequently to the passing of the *Succession Duty Act*, 1853, the outstanding legal estate was got in. In 1863 the then mortgagees, in exercise of their powers of sale, sold the entire estate by auction to *C.* in fee for a lump sum, but in the conveyance to *C.* it was recited (as the fact was) that the purchase-money had been duly apportioned between the life estate and remainder. *C.* then died, having by his will devised the estate to his nephew *D.* for life with remainders over, whereupon *D.* entered into possession and paid duty on his succession to his uncle at 3 per cent. to the full amount as on the fee simple.

The trustees of *C.'s* will then sold the estate to a purchaser, who raised the objection that although the sale to *C.* was made under powers contained in mortgages existing before the passing of the Act, succession duty had nevertheless attached, and would become payable in respect of *B.'s* succession upon the death of *A.*, who was still living:—

Held, upon a summons taken out by the vendors under sect. 9 of the *Vendor and Purchaser Act*, 1874,—First: That the mortgages of the life estate and remainder, though made to the same persons, were in all respects independent mortgages, and at the passing of the *Succession Duty Act* were not merged either at law or in equity; that the sale by the mortgagees under their powers in 1863 was to be regarded as a joint sale of the two interests, and could be supported only upon the principles applicable to joint sales of two trust properties by two sets of trustees; and that accordingly, inasmuch as a higher price was clearly obtainable by selling the fee simple in possession rather than the life estate and remainder separately, and as the purchase-

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money had been duly apportioned between the two interests, the sale was a proper exercise of the powers:

Secondly: That at the date of the *Succession Duty Act* *A.* and *B.* were respectively entitled in equity as tenant for life and remainderman in fee, subject only to money charges on their respective estates, and therefore that *B.* was then entitled to a "succession" within sect. 2 of the Act; and that since the mortgagees sold, in effect, as the agents of *A.* and *B.*, *C.*, as purchaser from them, took *B.*'s succession by "alienation not conferring a new succession" within sect. 15, and became liable to duty accordingly: but

Thirdly: That, as a "new succession" had been created by *C.*, duty then became payable on that succession only, and therefore, the full amount having been paid by *D.* on his taking under such new succession, the estate was discharged from all further duty on *A.*'s death.

It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their *cestuis que trust*; secondly, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice.

The proper mode of apportioning the prices of a life estate and reversion when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price.

The circumstances under which trustees of one property may join with the owner of another in selling both properties together, considered.

Observations on *Rede* v. *Oakes* (1).

Morris v. *Debenham* (2) approved of.

"By alienation or by any title not conferring a new succession," in sect. 15 of the *Succession Duty Act*, 1853, means, "either by alienation or by any title other than alienation, in both cases not conferring a new succession."

Settlement after the *Succession Duty Act*: *A.* tenant for life; *B.* remainderman in fee. *A.* and *B.* convey their estates for money to *C.* in fee. *C.* dies, having devised to *D.* in fee. *D.* pays duty on his succession from *C.*, and then sells: On *A.*'s death no more succession duty will be payable than has already been paid by *D.*

ADJOURNED SUMMONS.

Statement.

Under the will of Sir *Thomas Mostyn*, dated the 8th of June, 1818, and on his death on the 18th of April, 1831, his nephew, Lord *Mostyn*, became tenant for life of certain freehold estates in the county of *Merioneth*, with remainder to his first and other sons in tail male, subject to an outstanding legal mortgage in fee simple.

On the 9th of June, 1849, Lord *Mostyn* mortgaged his life estate by deed to certain persons as security for moneys advanced to him

(1) 4 D. J. & S. 505. 10 Jur. N.S. 1146 (2) 2 Ch. D. 540.

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by them, and on the 1st of June, 1852, Lord *Mostyn's* eldest son, *Thomas Edward Mostyn Lloyd Mostyn*, who had previously, in 1851, barred his estate tail, mortgaged his remainder in fee by deed to the same persons as security for a separate advance to himself. Each mortgage contained the usual power of sale on default.

Between 1852 and 1863 various transfers of the mortgages from father and son took place, in the course of which, subsequently to the passing of the *Succession Duty Act*, 1853, the outstanding legal estate was got in.

In January, 1863, the mortgagors having made default, the then mortgagees, in exercise of their powers of sale put up the estates for sale by auction in fee simple, and at such sale *Hugh Ker Cokburne* became the purchaser of portions of the estates, and signed the usual contract, which was in the ordinary form, and contained no provision for apportionment of the purchase-money in respect of the life estate and remainder.

The contract was carried into effect by an indenture dated the 19th of February, 1864, by which, after reciting that the mortgagees had contracted with *Cokburne* for the sale to him of the property in fee simple for a lump sum, and that the purchase-money consisted of a specific price for the life estate and of a further specific price for the remainder, the mortgagees conveyed the property to *Cokburne* in fee by limitations to the usual dower uses.

Cokburne died on the 22nd of May, 1866, having by his will, dated the 20th of May, 1864, devised the property so purchased by him to the use of Sir *Henry Cooper* and *George Allen*, their executors and administrators, during the lifetime of his, the testator's, nephew, *Edward Foster Coulson*, upon trust for him, and after his death to the uses and upon the trusts therein mentioned.

On entering into possession of the property as tenant for life under his uncle's will, *E. F. Coulson* paid duty on his succession at 3 per cent. to the full amount as on an estate in fee simple.

The trustees of *Cokburne's* will, in pursuance of an order made under the *Leases and Sales of Settled Estates Act* (the will containing no power of sale), contracted to sell portions of the properties so purchased by their testator to Lord *Harlech*, whose soli-

citors, in making their requisitions on the title, raised the objection that succession duty upon the succession of Mr. *Mostyn* had attached, and would become payable on the death of his father, Lord *Mostyn*, who was still living; and that it was now an incipient charge upon the property, and that the purchaser was entitled to have the property discharged from it.

The vendors, on the other hand, contended that succession duty was not, and would not become, a charge upon the estate, or payable by the vendors or any person deriving title through them.

A summons was then taken out by the vendors under sect. 9 of the *Vendor and Purchaser Act*, 1874, to obtain his Lordship's opinion "whether any succession duty would on the death of Lord *Mostyn* be payable by the vendors, or any person deriving title under them in respect of the hereditaments the subject of the contract."

The case was argued by counsel in Chambers, but his Lordship desiring to hear further argument directed it to be adjourned into Court, and it now came on for hearing accordingly (1).

(1) The following are the sections of the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), which were more particularly referred to:—

Sect. 2. "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act [19th May, 1853], either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

Sect. 14. "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them."

Sect. 15. "Where, at the time appointed for the commencement of this Act, any reversionary property expectant on death shall be vested, by

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Argument.

Chitty, Q.C., and *George Sweet*, for the vendors:—

First, we say that, in the events which have happened, the title was, on the 19th of May, 1853, when the *Succession Duty Act* came into operation, a title in possession. It is true that, from the mortgagor's point of view, the securities were distinct and separately redeemable; but from the mortgagees' point of view, and with regard to their interest, which became the only one, they were securities on the same lands and to the same persons, and were taken with a view to the events which have happened. Before any charge of duty could attach under the Act, the mortgagees were legally entitled in fee in possession, and in the way to become also absolutely and beneficially entitled in fee in possession without any further assurance from the mortgagors, unless something should be done which has not been and cannot now be done. The reversionary interest charged by the Act is one not in possession, but capable of coming into possession by death or the surrender of the particular estate. Ours is a title in possession acquired, in

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alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this Act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created; and where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

Sect. 33. "Where the donee of a general power of appointment shall become chargeable with duty in respect of the property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property."

Sect. 38. "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property."

effect, by the surrender of the particular estate before the Act. The mortgagees before the Act had the power created and vested in them, if that should happen which has happened, namely, default in payment of the mortgage debt, to sell the fee simple which they then had in possession, and accordingly the entirety was sold by them under their powers in 1864 to *Colburne*, and was conveyed by them to him in fee simple in possession by one deed.

[*W. Barber*, for the purchaser:—The deed recited that the life estate and reversion were sold for separate prices, so that there were substantially two contracts for sale. I do not dispute the accuracy of the apportionment.]

We submit that there was in fact only one contract, and that the object of the recitals was merely to shew the state of accounts as between the mortgagees and the two mortgagors. It is clear from the authorities that the mortgagees were entitled to sell the entirety for a lump sum. In *Rede* v. *Oakes* (1) three different estates were comprised in one contract, and though the Court refused specific performance against the purchaser, that was on the special ground that the estates were held under separate and distinct titles and belonged to separate and distinct persons, and that inasmuch as two of the estates were vested in two different sets of trustees, such a mode of sale by the trustees was a breach of trust. That case is, however, as appears from the judgment of Lord Justice *Turner*, an express authority for the proposition that two properties vested in different sets of trustees may be sold by one contract for one lump sum, when that course is beneficial to the *cestuis que trust* and the prices of the two properties are readily apportionable.

[JESSEL, M.R.:—The usual way of apportioning the price of a life estate and a reversion, where both are sold for a lump sum, is, I think, not quite correct. Instead of putting a value on one—the life estate, for example—and deducting that from the total price, the proper way is to value both, and to apportion the actual price in those proportions.]

The principle laid down in *Rede* v. *Oakes* has been clearly re-

(1) 4 D. J. & S. 505.

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cognised in *Cavendish* v. *Cavendish* (1) and *Morris* v. *Debenham* (2), although Vice-Chancellor *Malins* in the latter case appears to have questioned the actual decision in *Rede* v. *Oakes* (3). Whether the sale is under a trust or a power is immaterial.

[Jessel, M.R.:—The learned Vice-Chancellor seems to have thought that *Rede* v. *Oakes* was decided on technical grounds and is open to doubt, but I confess I do not think so.]

Here the sale as an entirety was clearly beneficial to the mortgagors, since the fee simple of an estate is worth more than the life estate and reversion separately; separate sales would therefore have been improvident.

[Jessel, M.R.:—I think if this sale can be supported at all, it must be regarded as, in effect, two sales. The case then stands thus: *A.* tenant for life; *B.* remainderman in fee. *A.* sells to *C.*, and *B.* to *D.* before the Act; *C.* and *D.* sell to *E.* after the Act. In that case there seems to be clearly a "succession" chargeable under the Act.]

When the Act (sect. 2) charges a reversion existing on the 19th of May, 1853, it charges a title which on that day was expectant on death, or on acceleration by arrangement with the tenant for life (sect. 15). Our title has never, since the mortgage of 1852, been expectant on the death of Lord *Mostyn*, or on any arrangement to be made with him. It stands as it then stood, except that the contingencies which then threatened it have failed. It might have become—by redemption of the life estate—a reversionary title, but that has not happened.

Secondly: Even assuming that the Act on coming into operation found and charged a beneficial reversion in this property, it so found and charged it subject to the then existing powers of sale vested in the mortgagees, the exercise of which would override the interest, and have the effect of transferring the liability to duty substitutively to the purchase-money, as provided by sects. 29 and 42: *Dugdale* v. *Meadows* (4).

Thirdly: The Act does not tax a reversionary interest existing on the 19th of May, 1853, unless on that day it was held by

(1) Law Rep. 10 Ch. 319.
(2) 2 Ch. D. 540.]
(3) 4 D. J. & S. 505.
(4) Law Rep. 6 Ch. 501.

gratuitous title, or has since passed by such a title. Your Lordship has recently laid down, in *Fryer* v. *Morland* (1), that the object of the Act is solely to tax successions taken by voluntary or gratuitous title, not property taken by ordinary purchase. Our title is that of purchasers of the reversion for value. It cannot be said that, in ordinary language, we have "succeeded" to the reversion. According to the rule laid down by Lord *Campbell* in *Lord Saltoun* v. *Advocate-General* (2), the Act must be read in its popular sense, and without regard to technicalities. As *Pollock*, C.B., said in *Attorney-General* v. *Lord Middleton* (3), the tax is imposed upon any person benefiting by the death of another.

[JESSEL, M.R., mentioned *Wilcox* v. *Smith* (4).]

Though payable only on and in proportion to the amount of actual enjoyment (sects. 20, 38, and 44), the tax is a charge on the succession and the successor as defined in sects. 2 and 15, sect. 5 being contradictory and giving a different rate in some cases. It is a charge from the 19th of May, 1853, or the subsequent creation of the succession (sects. 2, 10, 42 and 44), and no sale or charge for money or money's worth after the commencement of the Act can displace the charge if it has attached. There is, however, no clause in the Act which purports to make the charge attach before the 19th of May, 1853. When the Act at its commencement found a reversionary interest vested or capable of becoming vested in title in a person not the original donee, it substituted that person as the successor by sect. 15, and, by sect. 18, discharged the original donee from the operation of sect. 2. Why should the substituted successor be charged if he acquired his succession by purchase, when the original donee, if he had purchased, would not have been charged under sect. 2? Sect. 15 does not undo anything which has been done before the Act. The rule now established, that sect. 2 only charges a donee by gratuitous title, cuts down the terms of that section, which extends to purchasers for money as fully as the terms of sect. 15 can do. The same reasons which have required this restriction of sect. 2, require the like restriction of sect. 15. It is true there is no

(1) 3 Ch. D. 675, 681, 682.
(2) 3 Macq. 659.
(3) 3 H. & N. 125.
(4) 4 Drew. 40.

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express saving of purchasers in the Act, but they are saved by inference: *Fryer* v. *Morland* (1). There are in sects. 7 and 17 savings in special cases, but those sections seem to be superfluous; at least, the reason for inserting them has not been discovered. A purchaser for money is charged if he buys a succession after the duty has attached, because the object of charging successions by gratuitous title could not be effected unless he were charged. He stands in the place of a customs officer who collects the tax for the government as a tenant collects the income tax on his landlord's rent, but he takes care to deduct it from the purchase-money. So clearly is this anticipated and provided for by the Act, that a purchaser without notice of the charge is expressly exempted from it by the clause at the end of sect. 52. *A fortiori*, a purchaser before the Act who could not have notice of or collect a tax which did not exist cannot be charged with it. The sole object of the Act was to charge settlements then subsisting or thereafter made, and future devolutions on death—in no case to tax purchasers without notice, or otherwise than as sureties for the persons primarily charged and really intended to bear the burden.

Fourthly: Assuming duty to be payable on the death of Lord *Mostyn*, we submit that we should be entitled under sect. 38 to an allowance representing the value of the interest of which we should then have been "deprived." Therefore, inasmuch as duty has been paid in respect of the succession of *Coulson*, the tenant for life under *Cokburne's* will, and has been paid as on the fee simple and not merely as on an estate *per autre vie*, and also inasmuch as it has been paid at the same rate—3 per cent.—as would be payable on Mr. *Mostyn's* succession, no further duty is payable by us in any case. But supposing the 38th section does not apply, then we submit that upon the death of Lord *Mostyn* we should still be entitled under sect. 33 to an allowance in respect of the duty already paid, since our position as owners in fee simple is equivalent to that of a donee of a general power of appointment, who is entitled under that section to be allowed any duty already paid in respect of any limited interest taken by him.

Fifthly: Whatever duty, if any, the property did become liable to has been discharged by the payment made in respect of the

(1) 3 Ch. D. 675, 681, 682.

new succession created by *Cokburne's* will, for the rule is that when an expectant succession is alienated or devolves so as to confer a "new succession," it is the new succession which regulates the liability to duty, and one duty only is payable: *Attorney-General* v. *Lord Cecil* (1); *Attorney-General* v. *Littledale* (2); the duty being payable by the successor who first becomes entitled in possession: *Hanson* on the Act (3). The word "alienation" in the second part of the 15th section should not be severed from the words "not conferring a new succession"; the meaning of the section is that the old duty shall remain payable only where the succession has been transferred "by alienation or by any other title not conferring a new succession."

Upon every ground we submit that the property is not now liable to duty.

[They cited *Attorney-General* v. *Yelverton* (4); *Attorney-General* v. *Upton* (5); *Attorney-General* v. *Gell* (6); *Floyer* v. *Bankes* (7).]

[JESSEL, M.R.:—I only wish to hear you, Mr. *Barber*, on the last point, which may be stated thus: Suppose, under a settlement made after the Act, *A.* is tenant for life, with remainder to *B.* in fee: *A.* and *B.* convey for money to *C.* in fee: *C.* dies, having devised to *D.* in fee: *D.* pays duty on his succession from *C.* and then sells. On *A.'s* death, will any more succession duty be payable than has already been paid by *D.*?]

W. Barber, for the purchaser:—

I submit that when duty has once attached it remains a charge until paid. The words "alienation" and "any title not conferring a new succession," in the 15th section, are distinct expressions, and should be construed accordingly without the introduction of any other words. That being so, the present case falls within the literal terms of the section, for the estate has "become vested by alienation in another person," and therefore the duty is payable "at the same rate and time as the same would have been payable if no such alienation had been made." Then, as I understand your

(1) Law Rep. 5 Ex. 263.
(2) Ibid. 275.
(3) 3rd Ed. p. 285.
(4) 7 H. & N. 306.
(5) Law Rep. 1 Ex. 224.
(6) 3 H. & C. 615.
(7) 3 D. J. & S. 306, 311.

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Lordship's opinion to be that the sales of the life estate and remainder to *Cokburne* in 1864 were in fact separate sales, there was at that time a subsisting "succession" chargeable with duty under sect. 2, and on the sales by the mortgagees under their separate powers of sale that duty became payable by the purchaser, and still continues to be a charge upon the property: *Hanson* on the Act (1).

In *Attorney-General* v. *Cecil* (2) there was no "alienation," but the case was excluded from the operation of the 15th section because there was a "title conferring a new succession." I rely upon the argument which your Lordship used as counsel in *Solicitor General* v. *Law Reversionary Interest Society* (3), where your argument is thus stated (4): "However many dispositions there are by virtue of which the property is taken, if one of them creates a succession, duty is payable. Property which has once been a succession does not cease to be a succession; the duty having once attached continues to be payable, and it attaches as soon as the succession exists though only in expectancy: *Wilcox* v. *Smith* (5)."

[Jessel, M.R.:—I see I was arguing on behalf of the Crown in that case, Mr. *Barber*.]

Baron *Cleasby* in delivering the judgment of the Court states five conclusions which the Court considered established by the Act, and in stating the fifth conclusion, he adopts your Lordship's argument, for he says (6): "If the person has had a succession conferred upon him, he cannot by parting with it prevent it from being a succession; that is, prevent it from being property liable to the duty. It continues a succession, and will be when the proper time comes a succession enjoyed in possession, into whatever hands it has come." And he says further: "We think the fifth (conclusion) is an inevitable inference from the nature of a succession, from the language of the second part of the 15th section, and from the absurd consequences which would follow from holding the contrary."

I submit therefore, upon the construction of the 15th section,

(1) 3rd Ed. p. 283.
(2) Law Rep. 5 Ex. 263.
(3) Ibid. 8 Ex. 233.
(4) Law Rep. 8 Ex. 236.
(5) 4 Drew. 40. 3 Jur. N.S. 604
(6) Law Rep. 8 Ex.. 238.

that unless there has been a new succession created by some title other than alienation, the old duty remains.

[JESSEL, M.R.:—I think the words "not conferring a new succession" must be read in connection with the word "alienation." There can be no new succession without alienation.]

I am not contending that double duty is payable, but only that the payment of duty under *Cokburne's* will does not satisfy the Act. I submit that the duty imposed by the Act is in respect of Mr. *Mostyn's* succession, though, under sect. 20, it will not become payable until Lord *Mostyn's* death, and that the duty has not yet been paid in respect of this succession. This should now be commuted under sect. 41, or we should be indemnified against it.

Argument.

The Crown was not represented.

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I am of opinion that this is a perfectly good title on both of the principal points which have been discussed, and I will give my reasons with regard to both, for the matter is one of very considerable importance not merely as affecting this estate but as affecting a great many more.

The first question is whether, under the circumstances of the case, which may be stated very shortly, the mortgagees could sell at all so as to make a title?

Now the circumstances which are material to be stated are these:—The legal estate in the *Mostyn* property, which was freehold, was outstanding on mortgage. The property was subject to a settlement by will, under which Lord *Mostyn* was tenant for life with remainder to his eldest son in tail. Mr. *Mostyn*, who was the eldest son, barred the entail and became entitled in fee simple—that is, an equitable fee simple, Lord *Mostyn* being then entitled to the equitable estate for life. Under those circumstances Lord *Mostyn*, in 1849, mortgaged his life estate to mortgagees, and then, in 1852, Mr. *Mostyn* mortgaged his remainder in fee to the same mortgagees. They were distinct mortgages, although the mortgagees were actually the same persons. As I understand the law, there was no merger either at law or in equity. There

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could not be at law, for the legal estate was outstanding, and in equity the mortgagees, of course, had separate charges for distinct and wholly independent sums, on the life estate and on the remainder in fee respectively. Both the mortgages were accompanied with powers of sale. Then the *Succession Duty Act* passed. Then the mortgages were transferred, and subsequently to the transfers default took place, which entitled the then mortgagees to exercise the powers of sale. Then the mortgagees, the legal estate having been previously got in, put up the fee simple in possession for sale by auction, and sold the fee simple in possession of part for full value to a purchaser, Mr. *Cokburne*, who completed the purchase in the year 1864, and a conveyance to him was made in what I consider the proper mode, that is, although it was recited that the mortgagees had sold the fee simple to him for the whole amount, it was also recited that the purchase-money had been apportioned between the life estate and the remainder in fee, according to the values put upon them, and nobody quarrels with the apportionments or values, or says that they were otherwise than fair. Then *Cokburne* died in 1866, having devised the property in strict settlement, and his trustees have, in pursuance of an order of the Court under the *Settled Estates Act*, sold the property to Lord *Harlech*. It is clear that on *Cokburne's* death duty became payable—that is not denied—and it seems that the full amount, as on the fee simple, has in fact been paid. There is only one other fact that remains to be stated, namely, that Sir *Thomas Mostyn*, the original settlor of the *Mostyn* estates, was the uncle of Lord *Mostyn*, and that the subsequent settlor, Mr. *Cokburne*, was the uncle of the tenant for life, Mr. *Coulson*. So that the same rate of duty happens to be payable under both settlements, and the question does not arise as to what would happen if a higher duty was payable on one than on the other.

As I said before, the first point to be considered is, can a good title be made at all? That depends upon the consideration of whether trustees with a trust or power to sell the trust property can join with either the owner of another property, or the trustees for sale of another property, in selling both properties together. Now I will first consider that question upon principle, and then I will consider the authorities. It is generally found—by me at all

events—easier to arrive at a correct conclusion by starting with what appears to be the true principle, and then seeing whether the authorities militate against it. There is some little danger in this, for sometimes a Judge distinguishes authorities in a way which he might not do if he started with the authorities, notwithstanding he has been in the habit of so doing.

First of all, on principle, what is the duty of trustees for sale? It is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the *cestuis que trust.* It is further their duty to take care to receive the purchase-money, and to invest it properly according to the trusts. If, therefore, the sale of the property can be effected at a higher price by joining with somebody else, so far from that being a breach of that principle, they are only carrying out their trusts and performing their duty in so obtaining that higher price. It is very astonishing to me to find that any Judge could otherwise decide.

Secondly, it is their duty, as I have already said, to receive the purchase-money. If, therefore, they do join with any other person, whether that other person be a trustee himself or be a beneficial owner, they must take care that their share of the purchase-money is paid to them, and the purchaser must take care of that likewise, because he can only pay trust money to the trustees. Therefore when they do join with other people the purchase-money must be so apportioned before the completion of the purchase, and must be paid by the purchaser; the apportioned part coming to the trustees being paid to them. Those two things seem to be required on principle. Is there anything else required? Yes. I think it is quite clear that if the purchaser is to be prejudiced in any way he must have notice that the apportionment is an improper one—in other words, that he is about to pay to the trustees less than they are entitled to. But who is to decide upon the apportionment? Surely the trustees for sale, and that in a reasonable manner. They have power to sell their property to any one. If the person joining with them in the sale is an absolute owner, or even a trustee with a power of purchasing, they might sell to him. Therefore if they sell at a fair value, judging of the fair value in the same way as trustees usually judge of what is the

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fair value, that is, taking proper advice as to the value, and acting on that advice, of course they have committed no breach of trust, nor can the purchaser have any notice of any breach of trust. Therefore, as a general rule, the trustees are the persons to decide, under proper advice, in a proper and reasonable manner, as to the share of the purchase-money which is to be paid to them. The purchaser, having no notice of their acting otherwise than in that fair and reasonable manner, cannot be prejudiced by the fact of somebody else being of opinion that they ought to have a larger share. This seems to me to be the case on principle. Well, then, if we find that the titles to the properties are the same, so that there can be no question of conditions affecting one property not the subject of the trust being prejudicial to the property which is the subject of the trust, or if the prejudicial conditions affect the title to the property which is not the subject of the trust, and do not affect the title to the other property which is the subject of the trust, so that the insertion of them does not damage the trust property, there can be no objection to the trustees joining with other persons.

But then, I think, we might distinguish the two cases. First of all there are those cases in which evidence is required that there will be a higher price obtainable by a joint sale; and, secondly, those cases where no evidence is required that there will be a higher price obtainable, but evidence might be adduced the other way to shew that there would not be. The first class of cases applies to those instances in which there are two properties sold together, as, for instance, two sets of houses or two sets of lands, or a house and land, where one house belongs to the trust and the other house does not, or where one piece of land belongs to the trust and the other piece of land does not. In those cases, as a general rule, it is the duty of trustees to sell their own property alone, and not mix it up with that of other people. You must have evidence that the joint sale is more beneficial. It is very easy to ascertain that. Suppose there were a house belonging to trustees, and a garden and forecourt belonging to somebody else; it must be obvious that those two properties would fetch more if sold together than if sold separately. You might have a divided portion of a house belonging to trustees and another divided portion belong-

ing to somebody else. It would be equally obvious, if those two portions were sold together, that a more beneficial result would thereby take place. Or you might have a piece of land in the centre of a park or pleasure-ground, or a piece in the centre of a courtyard, which would be worth little or nothing if sold separately. But in those cases where it is not manifest on a mere inspection of the properties that it is more beneficial to sell them together, then you ought to have reasonable evidence to satisfy the purchaser that it is a prudent and right thing to do, and that evidence, as we know by experience, is obtained from surveyors and other persons who are competent judges. If they have given proper advice to trustees before the sale, and the trustees have acted upon it, that will also satisfy the purchaser; but in those cases, as a general rule, the purchaser should see that there is evidence that the combination of the property in one lot for the purpose of sale is beneficial to the *cestuis que trust*.

In the second class of cases you require no such evidence. The common experience of mankind tells you that. They are mostly cases where the trustees are the owners of an undivided share, and other persons, either trustees or not, are the owners of the other undivided share, so that the two sets of people together can sell the entirety. In those cases we do not want any special evidence, because everybody knows that the entirety of a freehold estate fetches more, as a general rule (of course there are exceptions to every rule), than the sum total of the price of the undivided shares. In that case, again, we want no apportionment, because the money apportions itself.

Another case is where the trustees are the trustees of the reversion, and the owners of the lease, or the owners of the life interest, or some other limited interest, will join them in selling the fee simple in possession. There, again, we want no special evidence. Everybody knows that the fee simple in possession will fetch more than the value of the reversion *plus* the value of the limited interest, and therefore, as a general rule, it is a prudent and wise thing for the trustees to join in the sale. As I said before, in all the cases you must see that there are not conditions of sale applicable to other property not subject to the trusts, which damage the value of the trust property for the purpose of sale; in other

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words, the purchasers must see that the sale is beneficial, as regards the price, to the persons entitled in equity to the ownership of the property sold. But if it is beneficial, then I am of opinion, on principle, that the trustees not only have a right, but that it is their duty, to join with the other persons in selling the property in one lot. So much for the principles applicable to the case.

Now, is there any authority the other way? At first sight it seems as if there were, but I think a careful examination of the authorities will shew that there is nothing which binds me to hold the contrary. Before going through the authorities I must say a word about the case before me. It is not exactly the case of a trustee for sale; it is the case of a mortgagee with power of sale, but a mortgagee selling is, in effect, a trustee with reference to the property comprised in the mortgage. There is this peculiarity also in the case, that the mortgagees happen to be the same mortgagees of both properties. You might have one mortgagee of two separate properties under two different settlements, or under a will and a settlement—the same rule evidently applies. The mortgagees in the case before me must have taken and acted upon the advice of an actuary or some other person competent to give an opinion as to apportionments. Of course there might be the case of a sale by a mortgagee in which he might have attempted to act wrongfully, and which is a case I have not forgotten. It might be that one of the two properties is overcharged, and it might be his interest, therefore, to apportion a larger sum in respect of that property, and he might find a valuer to apportion a larger sum. If the purchaser had no notice, and it were shewn that the apportionment was wrong, he would be safe, although, as between the defrauded mortgagor and mortgagee, the mortgagee must account to the mortgagor for the utmost value for which his property might have been sold. The title would still be good although the mortgagee could not set up the valuation improperly obtained as against the claim of the mortgagor who had been defrauded by too small a sum being appropriated to his property.

I will now consider the authorities. The first and most important authority upon the subject, because the judgment is a carefully worded one and excited considerable attention at the time, is

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the case of *Rede* v. *Oakes* (1). Now that case at the first blush looks as if it were an authority against what I consider to be the principles which ought to govern this case, but when it is looked at more carefully it really is not.

[His Lordship then read and commented on that case at considerable length, observing that the ground of the decision was that the sale had been so damaged by the nature of the conditions of sale, that it could not be considered as beneficial to the *cestui que trust*. The fact of damage, however, was not actually proved in the case, as, in his opinion, it might and should have been by the evidence of auctioneers or other competent persons. Among other passages of the judgments of the Lords Justices, his Lordship read the following from the judgment of Lord Justice *Turner* (2): "There are two difficulties which here present themselves: first, do the terms of the contract furnish the means of ascertaining upon any fair and reasonable basis the proportion of the proceeds of the sale which ought to be attributed to the trust properties; and, secondly, has the sale been so made as that the bulk of the trust properties may not have been injured by the other properties having been united with it in the sale"—and then observed:—] With great deference to that eminent Judge, I think the first proposition is not correct, and for this reason: It is not necessary, in my view of the law, that the contract with the purchaser should furnish the means of apportioning the money. That is immaterial to the purchaser: all he wants to know before the complete apportionment is made is what sums he is to pay to the trustees so that they may give him a receipt for their shares. Whether that is ascertained before the sale or after the sale, can make no difference so long as it is ultimately properly ascertained. If there is a proper valuation by a competent valuer after the sale, or the three properties which have been put up are apportioned proportionately before, what difference can it make? What has the purchaser to do with it except to see that the apportionment is proper? Why should it be set out in the contract with the purchaser? It seems to me, speaking with the greatest possible deference to the learned Judge, that nothing of the kind is required, and that that is not the question. The question which he

(1) 4 D. J. & S. 505. 10 Jur. N. S. 1247 (2) 4 D. J. & S. 514. 10 Jur. N. S. 1246

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first considered appears to me, therefore, wholly immaterial. The second proposition, though not quite accurately stated, is, I have no doubt, substantially sound and founded on good law. [After some further comments upon the remainder of the judgment, his Lordship continued:—]

I say when you carefully study *Rede* v. *Oakes* (1) you will see that, so far from that being an authority against the application of the general principle which I have ventured to lay down, it supports it, and shews that it might have been right to allow the purchaser's objection in that case, on the ground that the trustees' joining in the sale was not a proper thing, but it was the fact of their joining in the sale under improper conditions which, in the opinion of the Lord Justice—without evidence, as it appears to me—damaged the sale and prevented the property being sold for the best price.

The next case upon the subject, *Cavendish* v. *Cavendish* (2), is again a decision of the Court of Appeal. [His Lordship stated the case.] Though the judgment states no reasons, it is, when we come to look at the facts, as clearly right, if I may say so, as any judgment can be. It was as plain a case, I should have thought, of unobjectionable title as one could conceive, which may probably account for Lord Justice *James* giving no reasons.

Then I come to the third case, *Morris* v. *Debenham* (3), which is a decision of Vice-Chancellor *Malins*. If I may say so, I think again that that is a decision which is clearly right. I say so because it does not conflict with any proposition which I am laying down. [His Lordship stated the case, and after reading the following part of the Vice-Chancellor's judgment (4)—"Therefore I am of opinion that it is unnecessary to refer this to Chambers, because the vendor selling the reversion in fee is armed with the power of fixing the price, whether there be a sale of the lease and reversion together or not"—observed:—] Now to that I entirely assent. He is armed with the power, which is to be exercised in a reasonable way: that is, he must, like every trustee who sells property, take a proper opinion as to the value: that is, the only limit. For instance, if he got the opinions of three valuers he

(1) 4 D. J. & S. 505.
(2) Law Rep. 10 Ch. 31[illegible].
(3) 2 Ch. D. 540.
(4) Ibid. 546.

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might act upon them, but he must take proper and reasonable precaution. I think I have said enough to shew that the three authorities to which I have referred do not prevent my deciding that the general principle which is applicable to these cases is such as I have laid down, and, therefore, that this sale must be supported on that ground.

The other question is one which is very curious—indeed a very remarkable one in some respects. The point appeared to me so clear and so obvious that I could not imagine that it would have been elaborated as it has been throughout the argument. The question is whether, on the death of Lord *Mostyn*, there will be succession duty payable in respect of this estate at the rate of 3 per cent. The points suggested on behalf of the vendors—all of which I must decide, because the costs will depend upon it—are these:—First, that it is not within the 2nd section of the *Succession Duty Act*, because there were mortgages of the life estate and remainder with powers of sale vested in mortgagees before the passing of the Act, although exercised afterwards, and that the exercise of those powers of sale, vesting the absolute fee simple in the purchaser, destroyed the settlement, so to speak, just as if there had been a merger of the life estate with a reversion or a remainder before the passing of the *Succession Duty Act*. Then it was said if that is not the case, at all events the 38th or the 33rd sections apply. There were many other points also raised. But, first of all, how can the purchaser be in a better position than if Lord *Mostyn* and Mr. *Mostyn* had sold the estate? In equity, at the time when the Act passed, Lord *Mostyn* was tenant for life with remainder to Mr. *Mostyn* in fee. There were charges, no doubt, on their respective estates, but they were mere money charges. There was, therefore, a perfect succession under the 2nd section. It is no answer to say that by reason of the subsequent default of Lord *Mostyn* and Mr. *Mostyn* the two powers of sale became exerciseable. In equity they might have stopped the exercise at any moment, for these were not absolute rights to sell, but mere powers to sell in case of default in payment of certain sums of money. It is impossible to say that because the charges were created before the Act that the power thus came into operation before the Act so as to benefit the purchaser at the actual sale

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more than Lord *Mostyn* or Mr. *Mostyn*. If Lord *Mostyn* and Mr. *Mostyn* had been themselves the sellers, there is no doubt, from the very terms of the 15th section, that that section would have applied; for there would have been a pure "alienation not conferring a new succession." But the fact that the sale was made by the mortgagees makes no difference, for the mortgagees were, in effect, the agents of Lord *Mostyn* and Mr. *Mostyn*. The agency, so to speak, was an agency of Lord *Mostyn* and Mr. *Mostyn* respectively for sale. Though it may have been an agency granted for value, and not revocable except on payment of a sum of money, it was still a sale agency. Or, to put it in the most favourable terms for the vendor, suppose Lord *Mostyn* had sold to one person before the passing of the Act, and Mr. *Mostyn* had sold to another distinct person before the passing of the Act, so that there would have been no merger—and that is the case here, because the mortgages, though vested in the same persons, were, as I have already said, not merged either at law or in equity—and then Lord *Mostyn's* alienee and Mr. *Mostyn's* alienee, after the passing of the Act, conveyed to a purchaser to merge. There is no doubt that would have been within the very words of the 15th section. Again, take the case of a power of appointment. Supposing Lord *Mostyn* and Mr. *Mostyn* had each, before the Act passed, conveyed his estate to such uses as he should appoint, and each had exercised his power after the Act in favour of one person, in both cases you insert the appointment in the terms of the settlement, that is, read it as part of the settlement and not as overriding the settlement, but as derived from estates created by the settlement. It appears to me that all this can make no difference.

Then as regards the 38th section, when you come to look at it, it really cannot have the meaning which is attributed to it. [His Lordship read the section.] That was put as if where a tenant for life and remainderman had both conveyed, either before or after the Act, to a purchaser for value, the purchaser could be entitled to say on the dropping of a life estate, "I am to lose the life interest, and consequently I am bound to relinquish as much as I get"—(that was the argument put)—"and therefore I shall pay no duty." That is absolutely contradictory to the very terms of the 15th section. It obviously means relinquishing a benefit, not meaning the life interest which has just expired and therefore

cannot be dealt with, but some existing thing which otherwise the successor would be entitled to. It has, obviously, not the meaning which is attempted to be given to it.

Now, the 33rd section relates, it appears to me, simply to the donee of a general power. [His Lordship read the section.] It means this, for instance: a tenant for life with a general power of appointment exercises the power by appointing the estate in fee, having already paid duty in respect of his life interest; he is not to pay that duty over again, but he is simply to make up the whole sum chargeable under the 4th section as on a succession vested in himself in fee. That is all it means; he is not to pay double duty; he is only to pay one duty, being the duty which will be payable by himself in fee. But it was argued that a donee of a general power of appointment was equivalent to an owner in fee, that is, that where a person is owner in fee of an estate, the same rule and the same principle should apply. I cannot alter the interpretation of the terms of the Act. I am free to admit that the Act is a difficult Act, and the *dicta* are not less difficult to consider than the Act itself. I do not mean to say that it is not possible to find expressions in some of the cases to give some colour to the argument which has been put before me on this part of the case. It would take me too much time, and give me too much trouble, to analyze all the *dicta* to which my attention has been directed, but there is no decision that I know of which supports any one of the propositions.

I now come to a new point, which is a very much simpler one indeed, and that is, throwing aside all the distinctions with which we have been dealing, assume Lord *Mostyn* and Mr. *Mostyn* to have been in the same position to all intents and purposes as if the settlement had been made after the passing of the Act—*à fortiori* if it was made before the passing of the Act—and then that they had conveyed to a purchaser. Suppose the purchaser dies and then succession duty becomes payable, the question is whether the Government can get more than one set of succession duties, namely, that on one succession. Upon that I am clearly of opinion (as far as any one has a right to say he has a clear opinion about anything with reference to this Act of Parliament) that the Government cannot.

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Then, again, you must look at the meaning of the Act. First of all, what is the meaning of the 2nd section? [His Lordship read it.] Now, if you take these words literally, they certainly do cover every case of alienation, that is, where the original successor, as I call him, has alienated his succession, because the person taking under the "disposition" becomes "beneficially entitled upon the death" of another, and he becomes "beneficially entitled after the passing of the Act." If you read the words literally the words would include an alienee, and I see no reason why they should not. An alienee, after the passing of the Act, certainly might take the duty into consideration in fixing the price he paid for the property, if he were an alienee for value. If he were not an alienee for value, but an alienee by donation, or gift, then, of course, he would be subject to duty upon the same principle as the original successor who takes gratuitously. So that there seems to be at first sight no reason in the world—unless you get a reason from the word "derived"—why a purchaser should not be within the purview of the section. From the words in general you would say that the alienee was as immediately within the 2nd section as the original successor, although there may well be a difference where the settlor or disposer has not created an original gratuitous title at all. If, therefore, this 2nd section does apply to an alienee for value, you would have a fixed alienee without any 15th section at all. If, however, you take the other view, and say that the 2nd section does not apply to an alienee for value, but only to an alienee by gratuitous title, then you would not fix the alienee unless he came in with a gratuitous title, but even then he would be liable to duty in the place of the original settlor by reason of the words of the 2nd section. Then the 15th section is this:— [His Lordship read it, observing, in passing, that the words "shall have become entitled thereto" must mean "originally entitled," and continued:—]

Now, the first question I have to consider is, what do the words "or by any title not conferring a new succession" mean? Do the words "not conferring a new succession" apply to the word "alienation," as well as to the words "any title"? I think they do. I do not say that the grammar is perfect or beyond criticism,

but I think it means "either by alienation or by any title other than alienation, in both cases not conferring a new succession." It would be very difficult to say what title there could be conferring a new succession, if not an alienation. That shews at once that those words, "not conferring a new succession," must override the other words of the context. And, as I read the cases, the words have been so construed, that is, "not conferring a new succession" applies to the word "alienation" as well as to the words "any title." The result therefore is, that to bring a case within that section alienation must not confer a new succession. I asked Mr. *Sweet*—and probably no one could know better than he—by what possible title could a man confer a new succession if not by alienation? He was not aware of any. Nor am I sure that I am aware of any. Of course all new successions take place either by death, devolution, or alienation. If that is the meaning, we have an exception from the 15th section of titles conferring new successions or alienations conferring new successions. In all cases within the section the person to whom the succession is transferred pays at the same time and at the same rate as if there had been no such transfer. Why is he to pay at all? He is to pay because he comes in the place of the person originally liable to pay, that is, of the original successor, and he is to pay at the same time and at the same rate. What is that time? That is fixed by the 20th section, which provides that "The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof." So that there is no duty imposed until he becomes entitled in possession to the succession. The 15th section says that when there is an alienation not conferring a new succession the duty is payable as if the original successor had come in. Thus, if in the present case the purchaser *Cokburne* had not died, the result would have been, as I read the section, that the duty payable in respect of Lord *Mostyn's* death by Mr. *Mostyn*, if he had remained the owner, would have become payable on Lord *Mostyn's* death by *Cokburne*, the purchaser. But the purchaser dies, and there is then a title undoubtedly conferring a new succession, and the successor comes in under that title, and he is to pay succession duty. But why

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should he pay on more than one succession? He only gets in once. Why, when Lord *Mostyn* dies, the successor being still in possession, is it to be supposed that he is to pay over again? I cannot see why. The Government has by the merger got the benefit of reducing the estate once more to the fee simple on which there is a succession, and the successor coming in pays the duty. Why is it to get a second duty? Looking at the Act as a whole, and looking at it according to its fair meaning, it never could have been intended that where there are successive successions, as in this case, two sets of succession duty should be paid. Therefore, in the case which has happened, the successor having paid the duty, the estate, in my opinion, is free.

There is some argument both ways to be deduced from the 14th section. [His Lordship read it.] The argument is twofold —a sort of two-edged sword. On the one hand it may be said, you find a provision as to personalty that only one duty is to be paid, but you find no provision as to real estate; therefore more than one duty is to be paid on real estate. That would be very singular, because the Act was intended to assimilate the duty upon personalty and realty. But there is a reason for the section, it may be answered, which shews that the argument is not well founded. In the case of succession to real estate the object of the Act is to let the last succession prevail; but as regards personal estate, it is enacted that the highest duty shall be paid; and therefore the section was put in for the purpose of fixing the last succession with the highest duty which would have been payable by any of the previous successors—which might not be the case if that section had not been put in. That is the argument I prefer of the two. I think it is very difficult to give any meaning to the exception from the 15th section of alienations conferring new successions, unless it has the meaning which I attribute to it, because, if the alienation does not confer a new succession, duty is to be paid at the same rate and time as on the original succession; that is, you are to wait for the payment. If it confers a new succession, then, of course, you will get payment on whichever succession comes first. Therefore it is not necessary to specify that you are to wait. The moment there is a new succession created, and that succession comes first, that new succession

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appears to me itself to fix the time, and that the time for the payment of the duty shall be the time of the opening or coming into effect of the new succession.

In the present case, therefore, it appears to me, upon the fair construction of the Act, that only one duty is payable, and that being so, I think the title is a good one. There will, therefore, be a declaration that duty having been paid on the succession created by *Cokburne's* will, no further duty will be payable on Lord *Mostyn's* death, and the vendors must pay the purchaser's costs of this application.

I regret very much that I have not the Crown before me in any way so as to be bound by my decision in the case. It is by no means impossible that when Lord *Mostyn* dies the Court of Exchequer may take the opposite view. If my decision is wrong, the purchaser will still have a remedy, which I have not forgotten, against the vendor at a future time, in case he is called upon to pay the duty.

Solicitors for Vendors: *Allen & Son.*

Solicitors for Purchaser: *Dean & Taylor*, agents for *Longueville, Jones, & Williams, Oswestry.*

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Jan. 15.

Limited Company—Reduction of Capital and Shares—Loss of Part of Paid-up Capital—Writing off Loss—Petition—Jurisdiction—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *ss.* 9–16.

The nominal capital of a limited company was divided into shares of £32 each, all of which were subscribed for. On all the shares (except a few which were paid up in full) £29 per share was paid, leaving £3 per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the *Companies Act*, 1867, for reducing their nominal capital. They accordingly passed a resolution that the nominal capital should be reduced to a specified amount, and that each £32 share should be reduced to £23 by the extinction of £9 per share, to the intent that the existing liability of £3 per share on all the shares, except those fully paid up, should be preserved. They then

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presented a petition for an order for confirming the resolution, the minute required by sect. 15 of the Act stating that the amount of the reduced capital was divided into shares of £23 each (instead of the original £32), on all of which (except the fully paid-up shares) the sum of £20, and no more, was to be deemed to have been paid up:—

Held, upon an application by the company, by summons, for liberty to proceed with the petition,

That the Court had no jurisdiction to sanction the proposed reduction of capital, inasmuch as the Act contained no provision for enabling a company whose paid-up share capital had been partially lost, as in the present instance, to write off that loss by reducing the nominal amount of each share.

Statement.

THE *Ebbw Vale Steel, Iron, and Coal Company, Limited*, was registered on the 15th of April, 1868, with a memorandum and articles of association, and having a nominal capital of £2,383,200, divided into 74,475 shares of £32 each. The company commenced its business shortly after its registration, and had carried it on without interruption since. The property of the company consisted of numerous iron and coal mines, and tracts of land in various counties, and their business—which was that of iron and coal miners, and iron and steel manufacturers—was carried on upon a very extensive scale. The whole of the shares were subscribed for and duly allotted, and £29 per share was paid up, leaving £3 per share to be called up, except as to 515 shares, which were paid up in full.

In June, 1876, the annual meeting of the company was held, at which, in consequence of the depreciation of the company's property through the great fall which had then taken place in the value of iron and coal, a committee of shareholders was appointed to investigate the financial position of the company.

In August, 1876, the committee made their report, in which they recommended that the amount of capital lost through the depreciation of the company's property should be written off in the following manner, viz., by reducing the nominal share of £32 to £23, and reducing the sum paid upon each share from £29 to £20, thus leaving the existing liability of £3 per share remaining.

In order to carry out this recommendation, the company proceeded to take the steps required by the *Companies Act*, 1867, for effecting a reduction of capital, and accordingly, on the 17th of November, 1876, held an extraordinary general meeting, and

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passed a resolution directing the insertion in the articles of association of an additional article authorizing the company "from time to time to reduce the amount of its capital or consolidate or subdivide the same into shares of a larger or smaller denomination."

At another extraordinary general meeting of the company held on the 6th of December, 1876, this resolution was duly confirmed, thus becoming a special resolution, and the following further resolution was then passed:—"That the nominal capital of the company be reduced from £2,383,200, being 74,475 shares of £32 each, to £1,712,925 divided into 74,475 shares of £23 each, by the extinction on each of the said 74,475 shares of paid-up capital to the extent of £9, to the intent that the present liability of £3 per share on each of the said 74,475 (except the 515 fully paid-up shares) shall be preserved notwithstanding such reduction."

The last-mentioned resolution was duly confirmed at another extraordinary general meeting on the 22nd of December, 1876, and thereby became a special resolution.

The company then presented a petition under sect. 11 of the *Companies Act*, 1867, praying the Court to approve this last resolution and to fix a date at which the addition to the name of the company of the words "and reduced" might be discontinued.

The usual application was then made by the company, by summons in Chambers, for liberty to proceed with the petition, whereupon, in order to save the expense—which might possibly be useless—of settling a list of creditors and issuing notices and advertisements under the General Orders of March, 1868, His Lordship directed the summons to be immediately adjourned into Court for argument upon the preliminary question whether the Court had power, under the Act of 1867, to sanction a reduction of paid-up capital.

The question now came on for argument accordingly.

The minute submitted for the approval of the Court, as required by the 15th section, was in the following form:—"The capital of the company is £1,712,925, divided into 74,475 shares of £23 each, on all of which shares (except 515, numbered as follows . . . which are fully paid up) the sum of £20, and no more, is to be deemed to have been paid up."

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Argument.

Fry, Q.C., and *Charles McLaren*, in support of the summons:—

Our case is simply this: We have lost a portion of our capital, and we desire to do what a private firm would do under the same circumstances, namely, to write off the portion lost, and go on trading with the diminished capital, and declare dividends on that capital only. We submit that this can be done by a limited company under the provisions of the *Companies Act*, 1867, contained more especially in the following sections:—The 9th section (1) empowers a limited company to reduce its capital, if authorized so to do by its articles as altered by special resolution, which has been done here. Then sect. 11 requires the reduction to be confirmed by an order of the Court upon petition. Sect. 15 provides for the registration of the order and also of a minute (to be approved by the Court) stating the amount of the reduced capital, the number of the shares, and the amount of each share. Then sect. 16 (2) provides that the minute shall form part of the memorandum of association, and further, that no member of the company "shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute." We admit that at first sight this latter part of the section seems to point to unpaid-up capital in respect of which there is an existing liability, and it is no doubt the section which mainly gives rise to the difficulty in this case. But we submit that, in the absence of an express

(1) Sect. 9 is as follows: "Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital: but no such resolution for reducing the capital of any company shall come into operation until an order of the Court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned."

(2) Sect. 16 is as follows: "The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association; and, subject as in this Act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute."

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enactment to the contrary, the section may be held to refer to capital generally, whether paid up or not. If the proposed minute be adopted, it becomes, under that section, virtually part of the original memorandum of association, and persons would be estopped from alleging that more than £20 had been paid up.

[JESSEL, M.R.:—You do not "reduce" capital which has been already paid up and exhausted.]

You reduce the nominal capital—the word "capital" in sect. 9 meaning "nominal capital"—and then substitute, under sect. 16, the reduced nominal capital for the amount specified in the original memorandum of association. The 16th section thus gives the measure of liability. A power to reduce capital and shares was not included in sect. 12 of the *Companies Act*, 1862, but that section empowered a company to convert its paid-up shares into stock; that, however, is not desired in the present case.

[They mentioned *In re Crédit Foncier of England* (1), in which Vice-Chancellor *Bacon* sanctioned a reduction of capital where all the shares had been fully paid up.]

JESSEL, M.R., mentioned *In re Financial Corporation* (2), where the subdivision of existing shares into shares of a smaller amount was held invalid.

Judgment.

JESSEL, M.R.:—

I am very sorry that I cannot accede to this application, which is a most reasonable one, and I have no doubt that if the Legislature amends the Act of Parliament some provision will be made for enabling the Court to do that which I think it cannot do at present.

When a joint stock company has lost a portion of its capital, nothing can be more beneficial to the company than to admit that loss—to write it off—and, if it chooses to go on trading, to trade with the diminished capital which remains, the dividend being declared on the capital actually remaining. The object of the present application is to authorize this to be done: that is, a portion of the share capital having been lost, it is desired that

(1) Law Rep. 11 Eq. 356. (2) Law Rep. 2 Ch. 714.

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something should be written off each share so as to make the share of less nominal value, and to enable the company—still going on trading—to pay a dividend on the amount of the capital actually remaining; but, as I understand the *Companies Act*, 1867, such was not the object of the Act.

The object of the Act was to enable companies which had started with a larger nominal capital than they wanted, and therefore had imposed on their shareholders a liability to pay a much larger sum in the shape of calls than was required, or could fairly be required, for the business of the company, to relieve the shareholders from a portion of that liability, and I think it had no other object. The 9th section says that any company limited by shares may so far modify the conditions contained in the memorandum of association as to "reduce its capital." Now, first of all, what does "reduce its capital" mean, standing alone? I should think it meant an actual reduction. This is not an actual reduction, because the capital has been lost. It is merely acknowledging that to be lost which is lost. £9 per share is lost: £3 per share remains to be paid up, and the company wish that £3 to be still called up. All they want is to write off £9 per share as loss. That is not a reduction of capital: part of the capital has gone already: it has been reduced by a very unpleasant process. It requires no resolution of the company to do that. It wants to express that a portion of the capital has been lost. To my mind that is not the meaning of the Act of Parliament. Then the 10th section is, "The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the Court may fix, the words 'and reduced,' as the last words in its name; and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal Act."

Now what is the meaning of that? It means that the company is to give notice to the world that it is a company which previously offered to the public the security of a larger amount of nominal capital, that is, of a larger amount of liability on the part of the shareholders, than it offers now. Surely that never could have been intended to apply to a company which offers exactly the same security to the persons who may trust it in

future as it did before, because this company will continue to offer the security of all the capital it has and all it can get, and therefore there can be no difference. It is unnecessary to add another word on the 10th section.

Then the 11th section is merely formal. The 12th section is also immaterial.

Then the 13th section is this—and it is a very important section—"Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object." Of course, if you are reducing the liability of shareholders—that is, of those who contribute to the payment of debts—it is quite reasonable that the actual existing creditors should be allowed to object to such a proceeding; but when you are doing nothing of the kind—when, at the time you are proposing to effect the nominal reduction, you are leaving the actual existing creditors with every remedy they previously possessed, it surely would be monstrous that a creditor should be allowed to object to that with which he has no concern. It is utterly immaterial to the actual creditors whether or not you reduce the nominal capital of the company. They have all the existing assets of the company, and they have all the existing liabilities to fall back upon. Therefore, as I said before, it is unreasonable to suppose that the creditors would be entitled to take such a proceeding as that; and it would be still more unreasonable for the Court to go through the expensive and troublesome process of settling a list of such creditors. It seems to me, therefore, that the 13th section confirms the view that I take as to the meaning of the Act.

Then the 14th section says: "Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the Court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating, in such manner as the

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Court may direct, a sum of such amount as is hereinafter mentioned:" it is a long section, and I will not read the whole of it. So that if a creditor does not consent, you can only go on with the arrangement by securing his debt. There, again, I say that it would be unreasonable to apply that section to such a case as this.

The 15th section merely directs a registration, but it does throw a little light upon the matter too, for it says that the minute shall be given to the Registrar of Joint Stock Companies, and that he shall register it.

Then the 16th section, which is a very important section, is as follows:—[His Lordship read it.] That section is perfectly intelligible if you assume it to refer—as I do assume it to refer—to a reduction of actual capital, that is, a reduction of liability; as, for instance, supposing the shares were £20, and you reduced them to £10, and there was £10 paid up, there would in that case be no more to pay. Therefore the object of the section was to prevent the liability of the shareholders existing to the original amount; but it would have no meaning at all where you are taking away paid-up capital and allowing the liability to remain, because it says the liability is not to remain. A person is only to be liable for the difference in the amount which has been paid on such share, and the amount of the share as fixed by the minute. But here the company attempt to get over that by saying that the sum of £20, and no more, is to be deemed to be paid up. The Act of Parliament does not allow you to get rid of the section in that way. It is not what is deemed to be paid up, but what—as the 16th section expressly says—has been paid up; and that is the pinch of the case, if I may say so. Some ingenuity has been applied to this section, first, by putting that in the minute which is not true, and then by saying that the shareholders are to be estopped by the memorandum as altered from asserting that more has been paid up; but it is forgotten that it is only by the 16th section that the minute is made part of the memorandum, and that it is only made part of it upon the terms mentioned in the 16th section, namely, that the shareholders shall only be liable for the difference between the amount actually paid up and the nominal amount fixed by the minute.

The result therefore is, that in my opinion the Act of Parliament does not apply to the case in question, and that the summons must be discharged.

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Solicitors: *Ashurst, Morris, & Co.*

Ex parte JARMAN.

M. R. 1877 *Feb.* 2.

Solicitor and Client—Order for Taxation—Lien on Papers for further Costs—Attorneys and Solicitors Act (6 & 7 *Vict. c.* 73), *s.* 38.

In making an order for taxation under the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), s. 38, it is discretionary with the Court whether or not to add the order for the delivery up of papers.

A solicitor delivered to his client a bill of costs incurred in pending suits in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for the further costs:—

Held, that the order should be amended so as to include both bills.

Semble, the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up.

In re Teague (1) disapproved.

Statement.

THIS was a motion on behalf of Mr. *H. Jarman*, a solicitor, that an order of course for taxation of his bill of costs might be discharged under the following circumstances:—

On and previously to the 10th of November, 1876, *Jarman* acted as solicitor for Mr. *William Clark* in several suits, all of which were then pending, and also as agent for *Clark* in two appeals to the House of Lords, which were also pending, and on the 10th of November *Jarman* delivered a bill of costs to *Clark* in respect of fees and disbursements on account of the said suits and appeals.

On the 28th of November *Jarman*, at *Clark's* request, as he deposed, delivered briefs to counsel in one of the appeals, and paid the fees thereon, and about the same time, and after the delivery of his said bill, other work was done and disbursements

(1) 11 Beav. 318.

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were made by *Jarman* as *Clark's* solicitor in the said suits and appeals in addition to the particulars in the said bill.

Statement.

On the 5th of December, after these further costs had been incurred, an order of course was made on the petition of *Clark* for the taxation of the bill of costs delivered on the 10th of November, and directing that on payment by *Clark* to *Jarman* of what should be found due to him, or, in case it should appear that there was nothing due to him, that *Jarman* should deliver to *Clark*, upon oath, all deeds, books, papers, and writings in his custody or power belonging to *Clark*.

On the 15th of December *Jarman* delivered a further bill of costs to *Clark*, who, however, proceeded under the order of the 5th of December, and obtained an appointment for the taxation of the first bill. *Jarman* thereupon served him with notice of the present motion that the said order might be discharged for irregularity, on the ground that at the time when the same was applied for and obtained other fees and disbursements not mentioned in the petition or order were due from *Clark* to *Jarman*, for which *Jarman* had a lien upon the deeds, books, papers, and writings which by the said order were directed to be delivered up.

Argument.

Chitty, Q.C., and *Everitt*, in support of the motion:—

This order is irregular, as it directs the taxation of a bill of costs in pending suits and the delivery up of papers on which the solicitor had a lien for further costs.

In the case of *In re Byrch* (1), where a client who had employed a solicitor in several matters obtained an order of course for the taxation of the costs of one matter only, with a direction that on payment the solicitor should deliver all the papers belonging to the client, it was discharged with costs for irregularity.

The decision of Lord *Langdale* in another case, *In re Teague* (2), may be relied on as supporting the order; but that is inconsistent with the previous decision.

Waller, Q.C., and *Ilbert*, for *Clark*:—

The case of *In re Teague* regulates the practice of the office in such a case as this, and there is no reason for departing

(1) 8 Beav. 124. (2) 11 Beav. 318.

from it. If the solicitor has a lien on the papers for the further costs he can come to the Court when the client seeks to enforce the order and shew cause why the papers should not be delivered up.

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[They also referred to *In re Law & Gould* (1).]

JESSEL, M.R.:—

Judgment.

What has happened in this case has happened either through a mistake as to the meaning of Lord *Langdale*, in the case of *In re Teague* (2), or through some slip on the part of Lord *Langdale* himself, speaking with great deference of him.

What I understand the Act of Parliament to do is this: Where a solicitor has a bill of costs, and delivers it while a cause is going on, of course it is at his option to deliver his bill. If he delivers his bill it must be supposed that he wants payment; and, therefore, he cannot complain that his bill is taxed. His client has only a month to tax it in; if he does not tax it within a month the solicitor can bring an action, and, consequently, he ought to be the last person to complain of the client obtaining an order to tax, although the cause in respect of which the costs are incurred is still going on. That is according to the Act of Parliament, 6 & 7 Vict. c. 73. The Act says in the clearest terms that the order shall be made. By sect. 37, upon the application of the party chargeable by such bill as therein mentioned, it is said that the Lord Chancellor or the Master of the Rolls, or the other Courts or Judges referred to, are "hereby respectively required" to refer such bill to taxation. There is no option at all; it is not only an order of course, but it is imperative on the Judge. So the order to tax the bill is right. But then the Act of Parliament goes on to say: "Provided also that it shall be lawful for the respective Courts and Judges"—it being no longer imperative, but lawful—"in the same cases in which they are respectively authorized to refer a bill which has been so as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his pos-

(1) 21 Beav. 481. (2) 11 Beav. 318.

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session, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such Courts or Judges respectively where any such business has been transacted in the Court in which such order was made." No doubt those words "it shall be lawful" are to be distinguished from the preceding words, "are hereby respectively required." When the words "it shall be lawful" occur in an Act of Parliament, as a general rule, they mean that the thing shall be done, and it is considered to be a mere matter of course; but when I see the words in the same section with the words "the Judges are hereby required," I conceive there is then some discretion left to the Judge, and that, although in an ordinary case, as a matter of course, he must order it, in a special case he need not order it. That is how I read the section.

The consequence is, that there ought to be in the office, which I believe there is not at present, a form of order to tax which would apply to a case where a solicitor is known to have further accounts, and where a client may be in no hurry to pay them, and would rather leave the papers in the hands of the solicitor.

The order that has been given is, in my opinion, an unjust order. If it were before me as *res integra* I should simply discharge it. It is an order that, on payment of that one bill of costs, the solicitor, who is known to have further costs, and therefore has a lien on the papers until he is paid, shall deliver up all papers. That cannot be the right order. It is no answer to say, that, when you come for execution to enforce that order, the solicitor may bring the facts before the Court and ask the Court to hold its hand. That is not the course of the Court. The four-day order to enforce an order previously made is rather with reference to the execution than anything else; it gives the man another opportunity to obey the order, but, as the order is of course, the Court ought not to allow an argument upon the occasion of moving for the four-day order as to the propriety of the original order. That is not according to the course of the Court.

If I were not embarrassed by the decision which I am going to refer to, I think there would be no difficulty in the case. But I am not at liberty to overrule a decision pronounced in the year 1848 by one of my predecessors, Lord *Langdale,* even although I

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thought it entirely against principle, unless there were something else. I think I do find that something else in considering that decision.

In re Teague (1) was the case of a solicitor claiming a lien on papers in addition to his bill of costs in respect of another bill for work done for another man, as the solicitor alleged, on the retainer of the client *Feistell*. Lord *Langdale* came to the conclusion that the evidence was insufficient to shew that the client was liable to pay the bill of costs of the other man; but if so, the order was perfectly irregular, and he might have discharged it. But, unfortunately, he did not stop there, for he said: "If *Teague* has a special lien for any papers belonging to *Feistell* (the client) which are in his possession, and if *Feistell*, having paid the bill, shall endeavour to enforce the order for delivery up of such papers, *Teague* will be protected when application is made to the Court for the delivery up of the papers." In other words, if the client had actually given the retainer so as to make himself personally liable for the costs of the suit for business which was transacted for the other man, so far he is liable for the bill of costs, although the business was done for somebody else. The Master of the Rolls decided that he must shew that as a defence against the four-day order. That appears to me to be wholly against principle; but having been decided in 1848, if it stood by itself, it would, of course, regulate the practice of the office.

But I find the same Judge in the year 1844, which of course was before this decision, in the case of *In re Byrch* (2), decided this, that when a client who had employed a solicitor in several matters obtained an order of course for the taxation of the costs of one matter only, with a declaration that on payment the solicitor should deliver all the papers belonging to the client, the order must be discharged.

On reading that very carefully, it does appear to me, having looked through the whole case, that there was only one bill delivered. I admit it does not appear as distinctly as I could have wished on the face of the report; but that is the conclusion I have come to. First of all, it does not say that more than one bill had been delivered. In the next place, Lord *Langdale* says:

(1) 11 Beav. 318.

(2) 8 Beav. 124.

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"Mr. *Byrch* was employed by *Holland* in several matters, in two at the least. A bill of costs was delivered, not, as it is said, for the purpose of taxation, but to explain the situation of the suit." That convinces me that only one bill had been delivered in the suit, and the other bill had never been delivered at all. Then Lord *Langdale* goes on to say: "*Holland* obtains an order of course for the taxation of that bill alone, not comprising in it the other costs, and containing a direction that, upon payment of that particular bill, the solicitor should deliver up all the papers belonging to Mr. *Holland*. I am of opinion that this was not regular." Then he proceeds to say, which I think is right in principle: "It has been formerly settled that a party obtaining an order of course does it at his own peril." He afterwards explains, in *In re Pender* (1), that the Court cannot order a solicitor to deliver up papers in his hands if he has a lien upon the ground of other costs. I think that is quite right.

There is one way, possibly, of attempting to reconcile *In re Teague* (2) with *In re Byrch* (3), and that is, that there is supposed to be a distinction, which is very thin and very unsatisfactory, between a lien by a solicitor for his own costs, that is, the costs for the business which he has transacted for the client personally, and the costs for business which he has transacted for another man on the retainer of the client. But, obviously, such a distinction would be very unsatisfactory. It is far better to say that I disagree with *In re Teague* and I agree with *In re Byrch*. Considering that they are the decisions of the same Judge within a few years of each other, and that the decision in *In re Teague* will not fit with the decision in *In re Byrch*, I think there is sufficient doubt upon the authorities to enable me to say that the practice should be followed in the way I have indicated. As regards the present application, I have jurisdiction, which I shall exercise, to amend the order by inserting both bills. Under the circumstances I have mentioned, especially having regard to the correspondence which has taken place, independently of the law, I am of opinion that there should be no costs.

Solicitors: *H. Jarman; A. Hendriks.*

(1) 8 Beav. 299. (2) 11 Beav. 318.
(3) 8 Beav. 124.

In re REEVE'S TRUSTS.

M. R.

1877

Feb. 17.

Will—Legacy to Executor—Costs of Administration—Residue.

Bequest of £100, after the death of tenant for life, to *P.*, who was named as one of the trustees and executors, but renounced and disclaimed :—

Held, that the presumption that it was given to him in his character of executor was rebutted by the fact of its being payable after the death of the tenant for life, and that he was entitled to the legacy.

Where there is a gift of residue to be divided among certain persons and classes of persons, the costs of ascertaining of whom such classes consist are payable out of the whole residue before the same is divided.

Statement.

MARTHA REEVE, by her will, dated the 25th of October, 1860, gave an immediate legacy to one of her residuary legatees, which was to be considered on account of his portion thereinafter bequeathed; and she bequeathed all the residue of her personal estate to *James Flack* and *George Pamphilon* upon trust to pay the annual produce to *Martha Flack* for her life, and after her decease, upon trust (after payment thereout of a legacy of £100 to the said *George Pamphilon*) to divide the principal of the said trust fund into two equal moieties; and, as to one moiety, she bequeathed the same as follows: one half thereof to *Samuel Reeve*, and in the event of his decease, to his wife and children equally, and the other half in equal shares to *J. R. Burgess*, *J. W. S. Burgess*, and *Martha Burgess*; and, as to the other moiety, upon trust to divide the same into five equal portions, namely, one portion to the children of *Mary Snow* in equal shares; one portion to the children of *John Sawkins* in equal shares; one portion to *Susan Adams*, and, in case of her death in the testatrix's lifetime, then to *Susan Wallis* and *Mary Ann Mason* in equal shares; one portion to the children of *Thomas Sawkins*, and the remaining portion to *James Sawkins*, and, in the event of his death in the testatrix's lifetime, to *Eliza Chipperfield*, or, in the event of her decease, to her children equally; and if any of the objects of the foregoing bequests should die leaving issue, then such issue were to take their parents' share. The testatrix appointed the said *James Flack* and *George Pamphilon* executors of her will.

The testatrix died in 1861, and the will was proved by *James*

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Flack. *George Pamphilon* did not act as executor, but renounced and disclaimed the trusts of the will.

Martha Flack, the tenant for life, died in 1875.

James Flack, the sole acting trustee and executor of the will, died in 1868, and his personal representative paid into Court, under the *Trustee Relief Act*, the sum of £1931 10*s*. 11*d*., being the net residuary estate of the testatrix after deducting the expenses of converting the fund and paying the same into Court.

The petition was presented by the persons entitled to two tenth parts of the residue under the will of the testatrix, praying that the same might be paid to them respectively, and that the rights and interests of all other persons to the remaining eight tenth parts of the residue might be ascertained, and that such parts might be distributed and paid accordingly. There had been inquiries in Chambers to ascertain who were the persons now entitled to the portions given in trust for the children of *Mary Snow*, the children of *John Sawkins*, and the children of *Thomas Sawkins*, respectively.

Two questions now arose on the petition: first, whether *George Pamphilon* was entitled to his legacy of £100, he having renounced and disclaimed; and, secondly, whether the costs of ascertaining the classes of persons entitled were to be deducted from the whole fund before it was distributed, or from the shares to which the several classes were entitled.

Argument.

Chitty, Q.C., *Rigby*, and *Eaden*, for the Petitioners.

Marten, Q.C., *Caldecott*, and *Gardiner*, for the other persons beneficially interested.

R. H. Cole, for the representative of *James Flack*.

On the first question the case of *Jewis* v. *Lawrence* (1) was referred to, where a testator gave a leasehold house to *William Lawrence*, describing him as "one of my trustees and executors," and gave a legacy of £100 to *J. T. Paul*, whom he also described as "one of my trustees and executors." *Paul* died without having proved the will, but without having disclaimed or renounced: it was held that his executors were entitled to the legacy, the ine-

(1) Law Rep. 8 Eq. 345.

quality in the subject-matter of the two gifts being deemed sufficient to rebut the presumption that the legacy was given to *Paul* in his character of executor.

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JESSEL, M.R.:—

I think that *George Pamphilon* is entitled to this legacy. The fact of the legacy having been given to him after the death of the tenant for life appears to me to rebut the presumption that it was given to him in his character of executor.

On the second question,

Chitty, Q.C., submitted that the costs necessarily incurred in the inquiries for ascertaining the several classes entitled under the will were costs of administration, and, as such, they must be paid out of the whole fund before the residue was divided: *Eyre* v. *Marsden* (1); *Shuttleworth* v. *Howarth* (2); *Holgate* v. *Haworth* (3); *Gravatt* v. *Tann* (4); *Trethewy* v. *Helyar* (5).

Argument.

Davey, Q.C. (*amicus curiæ*), referred to *Boulton* v. *Beard* (6).

JESSEL, M.R.:—

Judgment.

The question I have to decide is as to the incidence of the costs of proving the pedigrees of various persons who are entitled to share in the residue of this estate.

The residue is given in shares, some of which are given to certain persons by name, who of course are entitled to their definite aliquot shares. Other shares are given to classes of persons who have to be ascertained. To satisfy the Court as to who are the members of these classes, the requisite evidence of pedigree must be given, which of course occasions considerable expense. In this particular case it was absolutely necessary to pay the whole of the residue into Court, because there was a question of construction to be decided which might possibly have affected the gift to the persons named; so the propriety, if I may say so, of instituting an administration suit could not have been questioned. There was a payment into Court of the whole fund under the *Trustee Relief*

(1) 4 My. & Cr. 231.
(2) Cr. & Ph. 228.
(3) 17 Beav. 259.
(4) Law Rep. 7 Eq. 436.
(5) *Ante*, p. 53.
(6) 3 D. M. & G. 608.

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Act; and, therefore, it devolved upon the Court to administer it, and to ascertain the titles.

It is clear from the case which Mr. *Davey* referred me to, of *Boulton* v. *Beard* (1), that where a will gives aliquot shares to certain persons by name, and gives other aliquot shares in settlement, and a question of construction arises on the settlement, the whole of the costs of deciding that question of construction (which may be the only reason for instituting the suit) will be thrown, not on the settled share, as to which only the question of construction arose, but on the whole of the residue, on the principle that they are administration costs, and that the costs of construing a will, though they are only the costs of construing the will as respects only one share, must be paid out of the whole residue.

The same principle has long ago been established, that the costs of ascertaining the construction of a gift of a pecuniary legacy are costs of administration, and are thrown on the residue. Now, there can be no difference in principle between ascertaining the facts as to the pedigree of the persons entitled to aliquot shares, and ascertaining the construction of the gifts to those persons. The question of fact as much applies to the persons entitled to the aliquot shares as the question of law on the construction of the gift; and it appears to me there is no solid distinction that can be suggested.

The only case I can find is not exactly in point. But on principle I think the rule should be so. The principle is, that there is no residue until the entire costs of administration are paid. Now, what are the "entire costs of administration?" Surely they include the ascertaining, not only of the specific and pecuniary legatees, but of the residuary legatees also. You cannot administer an estate, that is, divide it properly, until you have found out all the parties who are entitled. Therefore it appears to me on principle, that the whole of the costs of ascertaining who those persons are, are properly payable out of the estate which remains after paying the debts, funeral and testamentary expenses, and legacies; and that there is really no residue to be divided until you have paid all those costs. I shall therefore direct payment of all the costs so payable out of the residue.

Solicitors: *Cole & Jackson.*

(1) 3 D. M. & G. 608.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* NORTH EASTERN RAILWAY COMPANY.

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Jan. 16, 17, 22, 23, 24.

[1872 E. 39.]

Coal Mines—Breaking Bounds—Damage to adjoining Mine—Railway Company—Ultrà Vires to work Mines—Implied Sanction by Act of Parliament—Statute of Limitations—Bar only from Discovery—Laches.

The Plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the *Hartlepool Railway Company*. The boundaries of the two mines were settled by mutual agreement in 1862, and after some lengthy negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An Act of Parliament was passed in 1863 by which the *Hartlepool Railway Company* were to sell their mines within five years; and in 1865 the said railway company was amalgamated with the Defendant company, and all their assets and liabilities were transferred to them:—

Held, first, that although it was *ultrà vires* of the railway company to work mines, the Act of 1863 implied that the company were to have power to work their mines until the mines were sold, and that upon the amalgamation with the Defendant company the latter became liable for the wrongful acts of their predecessors:

Secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the Plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken:

And, thirdly, that the *Statute of Limitations* only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the Plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill.

Statement.

THIS was a bill filed on the 20th of June, 1872, by the Ecclesiastical Commissioners for *England* and their present lessees, Messrs. *Stobart & Morton*, against the *North Eastern Railway Company*, for an account of all coals and other minerals worked by the *West Hartlepool Harbour and Railway Company*, before that company was transferred to the *North Eastern Railway Company*, from a colliery of the Plaintiffs in the county of *Durham* called the *Newton Cap Colliery*; and of the coal which the company had rendered unworkable, without any allowance for the cost of work-

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ing such coal; and for payment of the amount due on taking such account; and to ascertain the damages sustained by the Plaintiffs by reason of the *West Hartlepool Company* having broken through the boundary between the *Newton Cap Colliery* and the Defendants' colliery, called the *Hunwick Colliery*.

The following were the facts of the case:—

The bishop of *Durham* had very extensive estates in the county of *Durham*. These estates had now become vested by Act of Parliament in the Ecclesiastical Commissioners for *England*. The colliery owned by the commissioners was called the *Newton Cap Colliery*, and the colliery held by the *West Hartlepool Company*, which adjoined it, was called the *Hunwick Colliery*. In 1846 the *Newton Cap Colliery* was demised by the then bishop of *Durham*, by a lease dated the 31st of December, 1846, to the predecessors in title of the co-Plaintiffs, Messrs. *Stobart & Morton*, for three lives, two of which were still in existence. The lease contained the usual covenant that a barrier of forty yards should be left between it and the adjoining colliery, and a similar covenant was contained in the lease of the *Hunwick Colliery*. The *Hunwick Colliery* belonged to Mr. *Matthew Bell*, and was leased by him on the 8th of September, 1856, to Messrs. *Jackson & Hodgson*, and *Jackson* became afterwards solely entitled to the colliery, and he assigned it to himself and Messrs. *Watson & Wood*, as trustees for the *West Hartlepool Company*. Under these circumstances, Messrs. *Stobart & Morton* were lessees of the *Newton Cap Colliery*, and the *West Hartlepool Company* were lessees of the *Hunwick Colliery*. Both of them were large collieries, one of them being capable of working 600 tons of coal a day, and the other 500 tons.

In 1862 questions arose as to the boundaries of these two collieries, and it was then ascertained that some part of the *Newton Cap Colliery* was in point of fact described on the *Hunwick Colliery* plan as being within the bounds of that colliery. This led to investigation, and through the instrumentality of Mr. *W. S. Stobart*, whose father was a partner in the *Newton Cap Colliery*, it was ascertained that certain land which undoubtedly belonged to the *Newton Cap Colliery* was described as being within the bounds of the adjoining colliery. In consequence of this Mr. *Johnson*, who had been for many years the surveyor, manager, and principal

agent of the *West Hartlepool Company*, and also Mr. *Bell*, the lessor of the *Hunwick Colliery*, investigated the matter, and the result was that a new map, accurately describing the boundaries, was drawn up, and it was then ascertained that there were three properties, namely, *Councillor's Copyhold*, *Ward's Leasehold*, and part of *Hunwick Lane*, which had been described as being within the bounds of the Defendants' colliery, when in point of fact they belonged to the Plaintiffs' or *Newton Cap Colliery*. This having been set right by the new map, it was considered that at that time, namely, in 1862, all questions between the parties were, as far as any disputes had arisen as to the boundaries and as to the working into each other's properties, settled; and, according to the evidence, it appeared that up to that time no coal belonging to the owners of the *Newton Cap Colliery* had been actually worked or removed by the Defendants.

After this a long correspondence took place between the parties, ending in May, 1864, the result of which was that an agreement was executed, dated the 11th of May, 1864, between a Mr. *Armstrong*, as representing the *West Hartlepool Company*, and Mr. *Stobart*, for himself and partners, under the name of the *North Bitchborn Coal Company*, providing for certain things to be done in respect of the collieries, and ending with this clause, "It is mutually agreed by and between the undersigned parties hereto, that in consideration of the above all claims on account of damage of every kind, and whether by trespass or otherwise by either party, be condoned and discharged from the signing of this agreement."

It further appeared that in 1863 an Act of Parliament was passed for the purpose of conferring additional powers on the *West Hartlepool Company* and for regulating the debenture debt and capital of the company, and by the 51st section of that Act it was provided: "Within five years after the passing of this Act the company, or, as the case requires, the trustee for the company, to the extent of the estates, shares, rights, or interest of the company in all collieries in which the company now have any estates, shares, rights, or interests, may and shall sell and absolutely dispose of the same either by public auction or by private contract, and on such terms and conditions as the company shall think proper; and

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the net moneys produced by the sale and belonging to the company shall, so far as they extend, be applied only in paying off principal moneys then secured by debentures of the company, or in the redemption of Redeemable Class A Stock."

In 1864 the collieries in the occupation of the *West Hartlepool Company*, including the *Hunwick Colliery*, were sold to two gentlemen, named *Lancaster* and *Brogden*, for the sum of £25,000, and the purchasers having paid a deposit of £5000, entered into possession of the colliery on the 8th of August, 1864.

In 1865 an Act of Parliament was passed for the amalgamation of the undertakings of the *West Hartlepool Company* and the *Cleveland Railway Company* with that of the *North Eastern Company*, and thereby the *West Hartlepool Company* was dissolved, and all the property, the benefits of contracts, and other interests belonging to the *Hartlepool Company* were transferred to the *North Eastern Company*, but subject to all existing contracts, debts, liabilities, engagements, and obligations affecting the same respectively, and to the payment or discharge, performance or observance thereof by the latter company.

The alleged working of the Plaintiffs' coal by the *West Hartlepool Company* was not discovered, according to the statements of the Plaintiffs, until October, 1870, when, in the course of working their coal, they found that large quantities of coal had been taken away by the Defendants, amounting in value to several thousand pounds.

A correspondence then ensued between the parties, and ultimately the Plaintiffs, who alleged that they could not find out the mischief done earlier than October, 1870, instituted this suit.

A number of affidavits were filed on both sides, and some of the witnesses were cross-examined. The result of the evidence was this:—*Gardner*, the overseer of the *Hunwick Colliery*, stated that, under a mistaken view that *Councillor's Copyhold* and the other lands were included in the demise to the Defendants, he had, in 1863, directed *Dixon*, the overman *of Hunwick*, to work directly into *Councillor's Copyhold*. *Dixon* stated positively that no coal had been worked from *Councillor's Copyhold* prior to 1863, and he proved by the yard book or books shewing the daily workings of the colliery, that in the month of January, 1863, he commenced

working under this property—that he worked all the pillars as well as the walls, and left all such part in goaf, that is, completely worked out, so as to let the surface down, and that the whole of the coal was so worked out before the beginning of the year 1864. There was also evidence to prove the nature of the damage which the Plaintiffs would suffer upon the termination of the Defendants' lease by means of the flow of water from a river close by, in consequence of the barriers between the two collieries having been destroyed by the Defendants.

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Glasse, Q.C., *Hastings*, Q.C., and *Borrett*, for the Plaintiffs:—

Argument.

The wrongful act by which our coal was worked and taken away and our barriers broken down was committed, according to the evidence, in the year 1863, and this having been more than six years before the filing of the bill, we should have no remedy at law, but must come to equity, on the ground of concealed fraud. This course was pointed out in *Hunter* v. *Gibbons* (1) and in *Bonomi* v. *Backhouse* (2).

If we had the *Hartlepool Company* here we should have been entitled, as against them, to a return of the profits made by the sale of this coal which has been taken from us, but the *Hartlepool Company* was dissolved, and all the property and assets of the company were transferred to the Defendants—the amalgamated company—under the Act of 1865; consequently we say that all liabilities were taken over by them, and they are now liable to us. The grounds of the defence are, that it was *ultrà vires* of the *Hartlepool Company* to work a coal mine, and, therefore, the Defendant company are not liable for their acts; secondly, that all wrongful acts were condoned by the release of 1864; and, thirdly, that we are precluded from recovering by reason of the *Statute of Limitations*.

On the first ground, we say that, by the Act of 1863, the *Hartlepool Company* were to sell the mines held by them within the period of five years, and that this was a recognition of their right to work the mines until they should be sold; consequently it was not *ultrà vires* of the *Hartlepool Company*, and the Defendants cannot escape liability on that ground.

(1) 1 H. & N. 459.

(2) E. B. & E. 622, 659; 9 H. L. C. 503.

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Secondly, as to the release, even if it could be held to apply to our colliery so that all wrongful acts done up to the time the release was signed were condoned, yet that necessarily referred only to the settlement come to between the parties in 1862. Up to that period none of our coal had been taken, and after the boundaries had been readjusted and a new map drawn out and settled, the Plaintiffs could not have supposed that while the negotiations were going on the Defendants had been violating the terms of the agreement, and had, in 1863, taken away the coal. All this was unknown to the Plaintiffs, and was not, in fact, discovered till 1870; therefore the release could not operate upon these intermediate wrongful acts of the Defendants.

Then, as to the defence of the *Statute of Limitations*. It was held in *Bond* v. *Hopkins* (1) that although the statute did not apply in terms to proceedings in equity, yet such proceedings were affected by analogy to the statute. In Courts of Equity the statute begins to run from the time when the injury is discovered, *Brooksbank* v. *Smith* (2), unless the Plaintiff is guilty of laches in not making use of such means as are in his power to discover the acts complained of at an earlier period: *Denys* v. *Shuckburgh* (3). There was no laches on the part of the Plaintiffs, who could not look into the earth to see what the Defendants were doing, and could not have supposed they were acting in direct opposition to the plans and agreement entered into. The *Hartlepool Company* must be taken to have known they were working our coal, or, at any rate, that it did not belong to them. It was not taken under a fair and honest mistake, which might happen to any persons, as in the case of *Wood* v. *Morewood* (4).

Then we ask for an account of all coal taken away from our mine, on the footing of the decree in the case of *Llynvi Company* v. *Brogden* (5), which was the value of the coals at the pit's mouth, with just allowances for the cost of raising, but not of getting or severing the coal. And we ask for an inquiry as to damages in respect of the destruction of the barriers between the mines. We shew by the evidence that this damage will be considerable, since,

(1) 1 Sch. & Lef. 413.
(2) 2 Y. & C. Ex. 58.
(3) 4 Y. & C. Ex. 42.
(4) 3 Q. B. 440.
(5) Law Rep. 11 Eq. 188.

when the Defendants' mine is worked out and abandoned, the water from the adjacent river will flow into our mine, and will do us a vast amount of injury.

MALINS, V.C.:—If I should decide in your favour, probably the better mode of ascertaining this damage will be by a reference to the arbitration of some skilled person.

This proposal was not objected to by counsel on either side.

Bristowe, Q.C., and *Williamson*, for the Defendants:—

Our first ground of defence is, that we are not liable because the *West Hartlepool Company* had no power to work coal mines. The Act of 1863 gave the *West Hartlepool Company* power to sell mines within five years. If it had been intended that they should work the mines, there would have been power given to them to do so: *Green* v. *London General Omnibus Company* (1); *Maund* v. *Monmouthshire Canal Company* (2); *Houldsworth* v. *Evans* (3); *Ashbury Railway Carriage and Iron Company* v. *Riche* (4).

We now come to the release. That is clearly and distinctly in favour of the Defendants. The words are: "All claims on account of damage of every kind, and whether by trespass or otherwise by either party, are agreed to be condoned and discharged from the signing of this agreement."

The last question, and the most important, is that founded upon the *Statute of Limitations*—that is, whether the time begins to run from the wrongful act being done, or from the time of its discovery: *In re Kensington Station Act* (5); *In re Stead's Mortgaged Estates* (6); *Hovenden* v. *Lord Annesley* (7). In this case the trespass was committed more than six years before filing the bill. This is an alleged legal injury done, and the statute says if you have a remedy it is only within six years. Here is an exact legal remedy and an exact legal bar. The case of *Brooksbank* v. *Smith* (8) was decided upon the fact that the money sought to be recovered was a trust fund, and you might get relief if you

(1) 7 C. B. (N.S.) 290.
(2) 4 Man. & G. 452.
(3) Law Rep. 3 H. L. 263.
(4) Ibid. 7 H. L. 653.
(5) Law Rep. 20 Eq. 197.
(6) 2 Ch. D. 713.
(7) 2 Sch. & Lef. 607, 613.
(8) 2 Y. & C. Ex. 58.

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could find the fund in specie. If a man has means of discovering the alleged fraud at an earlier period, and does not do so, then it is laches on his part, and he cannot recover: that was *Denys* v. *Shuckburgh* (1). So here the first meeting to examine the boundaries took place in July, 1862, which was the beginning of the knowledge the Plaintiffs had. From that time the Plaintiffs were bound to keep themselves informed of the operations carried on by the Defendants. It is evident that whatever coal was taken was by mistake, and not intentionally; and upon the decision in *Dean* v. *Thwaite* (2), the case on which we mainly rely, the account would be limited to six years; and the same principle was acted upon in *Lockey* v. *Lockey* (3), *South Sea Company* v. *Wymondsell* (4), and *Harcourt* v. *White* (5).

The Plaintiffs were put upon inquiry in 1862, and might with reasonable diligence have discovered the wrongful act in 1863, or certainly before the release was executed in 1864.

Glasse, in reply:—

[MALINS, V.C.:—You need not trouble yourself about the question of *ultrà vires*.]

On that subject I should nevertheless wish to refer your Lordship to the case of *Mersey Docks Trustees* v. *Gibbs* (6), in which it was laid down that trustees may render the property of their beneficiaries liable to third persons for acts done in the exercise of the trust, and the distinction is drawn between cases of contract and cases of tort.

Then, as to our being put upon inquiry, there is nothing to shew that we were guilty of any laches in the matter. The case of *Lindsay Petroleum Company* v. *Hurd* (7) shews that where fraud is established against a party, it is for him, if he alleges laches in the other party, to prove when the other acquired a knowledge of the truth, and that he knowingly forebore to assert his right.

The rule laid down in *Dean* v. *Thwaite* cannot be adopted. If the report were more full it would probably be found that there

(1) 4 Y. & C. Ex. 42.
(2) 21 Beav. 621.
(3) Prec. Ch. 518.
(4) 3 P. Wms. 143.
(5) 28 Beav. 303.
(6) Law Rep. 1 H. L. 93, 126.
(7) Law Rep. 5 P. C. 221.

was evidence to shew that the Defendant there was put upon inquiry.

[He also referred to *Bainbridge* on Mines (1).]

Jan. 24. MALINS, V.C.:—

This bill was filed by the Plaintiffs, seeking relief against the Defendants in consequence of the boundaries of the colliery having been broken and the coal worked under certain closes of land which were included in the lease to Messrs. *Stobart & Co.*, and which, it was alleged, were worked by the *West Hartlepool Company* before the property was transferred to the *North Eastern Railway Company*, under which the Plaintiffs contended that the *North Eastern Company* are liable. And the bill also seeks to recover damages for the consequence of their having broken down the barrier between the two collieries, which it is said is of great importance, and has occasioned great damage to the Plaintiffs. The case, which has occupied four days in argument and in hearing the evidence, has been very elaborately argued, and everything has been said on both sides that could be said in the interests of the respective clients, and I have now to decide it.

It may, I think, be assumed that all questions which had arisen up to the 11th of May, 1864, when the agreement was signed between the owners of the adjoining collieries, were then settled, and if the Plaintiffs had notice that the coal under *Councillor's Copyhold*, *Ward's Leasehold*, and *Hunwick Lane* had then been worked, I should have been of opinion that this suit could not have been sustained, because it would have shewn distinct knowledge at that time: and although it is not in terms a release, yet, looking at the correspondence and all that passed, I think after the expiration of six years the Plaintiffs would have been barred from any right to sue for what had been done. But I am of opinion, upon the evidence, that they did not know the fact, and had no reason for suspecting it. Mr. *Bristowe*, on the part of the Defendants, admits that coal had been worked under *Councillor's Copyhold*—that, in fact, it had been absolutely worked out and

(1) 3rd Ed. p. 611.

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become goaf—that is, they have not only worked and taken out all they could, leaving proper pillars, but they have worked backwards, let the surface down, and it is what is technically called goaf. I am satisfied from the evidence that coal has also been worked under *Ward's Leasehold* and under *Hunwick Lane*. It was argued strenuously by Mr. *Bristowe* that, although he could not deny that the coal had been worked from *Councillor's Copyhold*, there was nothing to shew when it was worked; and, therefore, I suppose he desired me to infer that it might have been done before the *West Hartlepool Company* had anything to do with the concern, but I think the evidence proved that point beyond a possibility of doubt. The way in which it was done is shewn distinctly by the evidence of *Gardner*, the overseer of the *Hunwick Colliery*, who says that he directed *Dixon*, the overman, to work directly into *Councillor's Copyhold*. That was in the year 1863. Therefore, if *Gardner's* evidence is to be relied on, it shews distinctly that it was done by the *West Hartlepool Company*, and before the document which is called a release of the 11th of May, 1864; but I am satisfied that at that time the fact of its having been done was not known to the Plaintiffs. How it was that *Gardner*, a subordinate officer, gave these directions to work into these properties after the plan had been settled is difficult to understand. I do not make any imputation upon *Gardner;* there was no improper intention; and indeed the consequence of breaking bounds into an adjoining colliery is so serious, and throws such liabilities on those who break the bounds, that I must assume, although it is clear that this was done, it was done under a mistake, and not with any improper intention to take away from their neighbours that which belonged to them and not to themselves. Then the time at which it was done is distinctly shewn by the evidence of *Dixon*, the overman, who says that he knows of his own personal knowledge that when the *West Hartlepool Company* took the *Hunwick Colliery* in February, 1860, none of the coal comprised within *Councillor's Copyhold* had been worked, and he is quite positive that no portion of such coal had been worked until the year 1863. Now, if I believe this witness—and I am bound to do so, since he was not called for cross-examination, and there is no imputation on him—that proves the case of the Plaintiffs.

Then he shews distinctly by the book called the Yard-book that in the month of January, 1863, he commenced working under this identical property; that he worked out all the pillars as well as the walls and boards, and left all such part in goaf, and that the whole of the coal was so worked out before the beginning of the year 1864.

This, therefore, makes it perfectly clear that it was in the year 1863 that this colliery was worked, and that was during the time the *West Hartlepool Company* was working it. If, therefore, I had the *West Hartlepool Company* here instead of the *North Eastern Company*, I take it to be perfectly clear on this evidence that I should be bound to come to the conclusion that the coal under the Plaintiffs' land had been worked by the *West Hartlepool Company*, and that they would be answerable for the consequences of what they had done. The breaking of the barrier or boundary of the Plaintiffs' colliery is, therefore, in my opinion, clearly established, because they could not break into any of this coal without breaking that barrier of forty yards, which ought to have been left, and which would have been, as all the witnesses agree, a perfect protection to the *Newton Cap Colliery* from any inundation of the adjoining colliery, whatever the amount of the water may have been. Therefore, up to this point, I have come to the conclusion that the coal has been worked by the *West Hartlepool Company* under the Plaintiff's lands in question, and that the *West Hartlepool Company*, if they were here, would clearly be liable for the consequences of what has been done.

But Mr. *Bristowe*, on behalf of the Defendants, rests his defence on the effect of the release of the 11th of May, 1864, and he says that the acts of the *West Hartlepool Company* were *ultrà vires*. It is said, with truth, that, inasmuch as they were a harbour and railway company, they had no Parliamentary power to work collieries, that it was altogether beside the object of their incorporation, and that what they did was *ultrà vires*. That it is *ultrà vires* of a railway company or harbour company to work collieries does not and cannot, in my opinion, admit of the slightest doubt; and, therefore, I am very clearly of opinion with the Defendants to that extent that the workings of these collieries by the *West Hartlepool Company* were altogether unauthorized; and if matters had so

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rested, possibly that would be a defence available to the *North Eastern Company*, who are the successors in title to the *West Hartlepool Company*. But these matters having come before Parliament in 1863, when the *West Hartlepool Company* desired to obtain additional powers, an Act was passed in that year, which does not in terms recite the fact that the *West Hartlepool Company* were working collieries, but it does that which is equivalent to it, and, in my opinion, most distinctly legalizes, by the 51st section, the holding of these collieries by the company, because it gives the company power to sell and absolutely dispose of all collieries and coal royalties in which the company had any interest on such terms and conditions as the company should think proper. Therefore this authorizes them within five years to sell the colliery. That recognises the fact that they had collieries to sell, and having collieries to sell, it recognises the fact that they were working collieries, and having authorized them to sell those collieries within five years, I agree with what Mr. *Graham Hastings* said in opening, that that is an implied authority for the *West Hartlepool Company* to work the colliery during the period within five years up to the sale taking place. From 1863 to 1868, therefore, they are authorized by Act of Parliament, in my opinion, to work collieries, and that which was *ultrà vires* up to that time by this Act of Parliament became legal, and they were the legal and authorized owners of the collieries, and were authorized at any time within that period to sell them, as sell them they did. That, I think, disposes of the question of *ultrà vires*.

Then what took place with regard to these collieries was this. It became expedient and for the interest of the *North Eastern Company* to amalgamate with this *West Hartlepool Company*, and accordingly they obtained an Act of Parliament authorizing the amalgamation. At that time what was their situation with regard to these collieries? The *West Hartlepool Company* up to that time, viz., 1864, at all events, had continued to work the collieries. They had sold them in round numbers for £25,000 to two gentlemen named *Lancaster* and *Brogden*. *Lancaster* and *Brogden*, it appears, entered into possession of this *Hunwick Colliery* on the 8th of August, 1864. But it appears that at that time they had only paid a deposit of £5000, and that the whole purchase-money was

not paid. Therefore, the situation of matters at that time was this, that the *West Hartlepool Company*, to a certain extent, had ceased to be the owners of the colliery, because they had sold it to *Lancaster* and *Brogden*, but they had a lien for the unpaid purchase-money, amounting in round numbers to £20,000, and in this state of things they had some interest. There were other collieries which, I imagine, were unsold, because by the balance-sheets submitted to the shareholders of the *North Eastern Railway Company* at a half-yearly meeting in February, 1868, among other assets, there was a large amount to be received for collieries. That shews, therefore, that their assets consisted in part of the sum to be received from the *West Hartlepool Company* for purchase-money either for the collieries already sold to Messrs. *Lancaster* and *Brogden*, or for some other collieries. In this state of things the Act of Parliament for the amalgamation of the companies passed, and on the passing thereof the *West Hartlepool Harbour and Railway Company* were dissolved, and all the property, the benefits of the contracts, and everything which the *West Hartlepool Company* had, was transferred to the *North Eastern Company*, but subject to all existing contracts, debts, liabilities, engagements, and obligations affecting the same respectively, and to the payment or discharge, performance or observance thereof by the company.

I read this Act of Parliament as amounting to this, that whatever liabilities the *West Hartlepool Company* were under with respect to the property were transferred to and then became the liabilities of the *North Eastern Company*, and in this way, whatever liability attached to the *West Hartlepool Company* before these Acts now attaches to the *North Eastern Company*.

The liability of the *North Eastern Company* being in this manner established, the point which was mainly relied upon by Mr. *Bristowe*, and upon which the great stress of his argument was laid, was the *Statute of Limitations*. With regard to the *Statute of Limitations*, independently of my decision, I should desire to look at it in a common-sense point of view, in a view in which such things ought to be dealt with. If a wrong is done under the statute of *James*, an action for trespass can only be maintained like any other action at common law within six years after the

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act done; and, accordingly, in the case of *Hunter* v. *Gibbons* (1), where I think an action was brought for a wrong done more than six years before, which had not been discovered, the Plaintiff attempted to get out of the difficulty by an equitable plea, but the Court of Exchequer would not allow an equitable plea, and the Lord Chief Baron *Pollock* said that if they wanted that, they must go to a Court of Equity, which would, in his opinion, not be bound by the *Statute of Limitations*. Take the common case. Suppose *A.* is the owner of an estate under which it is well known there is a valuable seam of coal, or many seams of coal, and that *B.* is the owner of an adjoining estate containing the same seam or seams of coal, *A.*, in perfect security, not desiring at present, for various reasons which might be suggested, to sink shafts upon his property, keeps it, as he believes, intact. *B.*, his neighbour, all this time works actively and raises, as in the present case, hundreds of tons of coal a day. *A.*, believing that all the coal he sees being raised by *B.* comes from under his neighbour's estate, and in perfect security says, "This is so profitable an operation which my neighbour is carrying on, that I am inclined to do the same;" and he accordingly authorizes a shaft to be sunk, and then discovers that for more than six years a large portion of his coal has been worked by his neighbour. It is argued that under those circumstances he has no remedy, because it was done more than six years ago, although he did not know it, and had no means of knowing it, because he could not look through the solid earth, and could not have found it out without having recourse to that which would be totally uncalled for and unjustifiable on his part, namely, asking to go down his neighbour's pit to see that they were not doing that which he had no right to assume they were doing. It is gravely argued that under these circumstances he has no remedy. But it has been the settled rule of this Court for more than a century that wherever there is fraud, and this would be fraud, the time begins to run only from the discovery of the fraud, and most reasonably, because on what principle is it that the *Statute of Limitations* is a bar? Because it is considered that there is laches on the part of the person suing. If he has had a right for more than six years, and it is known he has had

(1) 1 H. & N. 459.

that right, to lie by for six years, or any other number of years prescribed by the *Statute of Limitations*, is laches which is binding on him; and, therefore, if he will lie by, the statute runs against him; but how can there be any laches when he does not know of the act done?

The case of the *South Sea Company* v. *Wymondsell* (1) is a leading case on the subject, and appears to me to proceed on the clearest principles. There the fraud had been committed long before, but had then been discovered within six years, and the decision was, that although the fraud had been committed more than six years, as it was discovered within six years, the time only began to run from the discovery: that is the time when the Plaintiff was first guilty of laches.

Now we all know that before the 3 & 4 Will. 4, c. 27, the *Statute of Limitations* was not binding in Courts of Equity, but, as Lord *Redesdale* expresses it in *Hovenden* v. *Lord Annesley* (2), where there is no fraud or any particular circumstances, Courts of Equity act not merely by analogy, but in obedience to the statute. Therefore, where there is no fraud, that which would be binding in a Court of Law would be also binding in a Court of Equity, and, consequently, twenty years was a bar to claims in equity, because that period would be a bar at law; but in a passage from Lord *Redesdale's* judgment in *Bond* v. *Hopkins* he says (3): "Nothing is better established in Courts of Equity . . . than that where a title exists at law and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that where a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity. Both these cases are considered by Courts of Equity as affected by the *Statute of Limitations:* that is, if the equitable title be not sued upon within the time, within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute; the Court, acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him; if his title were solely at law, he shall be barred in equity." But equity will remove the legal bar

(1) 3 P. Wms. 143. (2) 2 Sch. & Lef. 607, 630.
(3) 1 Sch. & Lef. 429.

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proceeding from lapse of time as it would any other legal advantage if sought to be used unconscientiously. That is all the relation this statute has or ought to have on proceedings in equity.

The same principle is acted on in a case of *Brooksbank* v. *Smith* (1). That was a case upon the discovery of a mistake. The mistake had been committed much more than six years before, but had been discovered within the six years, and the question was whether a suit to correct the mistake could be maintained. Mr. Baron *Alderson* says: "Then is the *Statute of Limitations* a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind Courts of Equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the statute runs from the discovery, because the laches of the Plaintiff commences from that date on his acquaintance with all the circumstances." Laches, therefore, cannot run until the facts are known.

Then Mr. *Bainbridge*, in his very learned and able treatise on the law of mines (2), discusses the law upon the same principles, and cites, in support of what he lays down as the law, the cases of *Denys* v. *Shuckburgh* (3), *Hunter* v. *Gibbons* (4), and *Dean* v. *Thwaite* (5), and many other authorities.

The law therefore is, I think, clearly settled that in cases of fraud the *Statute of Limitations* does not begin to run until the fraud is discovered; and although it is not necessary in this particular case to come to the conclusion that what was done was done fraudulently, yet for the purpose of this distinction between cases which are fraudulent and cases which are not—although, I repeat, I may be distinctly of opinion that neither the *West Hartlepool Company* (and as a corporation they could not commit a fraud) nor their agents, who were incapable of doing so, intended to commit a fraud—yet, for the purposes of the statute, the breaking of bounds into your neighbour's colliery must be considered a fraudulent act; and, therefore, it is now clearly by these authorities settled, in my opinion, that in all cases of fraud the time for barring the statute begins to run only from the time

(1) 2 Y. & C. Ex. 58.
(2) 3rd Ed. p. 611.
(3) 4 Y. & C. Ex. 42.
(4) 1 H. & N. 459.
(5) 21 Beav. 621.

the fraud was discovered, or by reasonable diligence might have been discovered.

Then it is said that in this case by reasonable diligence this fraud might have been discovered in 1864. Now this is a part of the argument of Mr. *Bristowe* which made the most serious impression upon my mind. He says these parties carried on a long negotiation from 1862 to 1864; it was known that in 1862 there had been a mistake as to the boundaries; the *Hunwick Collieries* had been worked very extensively ever since; and in 1864, by reasonable diligence, they might have discovered that these particular lands had been worked under by the neighbouring colliery. Now this depends a great deal upon the inquiry a man is bound to make. I do not refer to it in detail, but the learned counsel engaged in the case will remember very well the distinct manner in which *Johnson* gave his evidence. He described the circumstances under which the new boundary map was prepared in 1862. It is said that in 1864 they might have made inquiry whether this land had been worked under between 1862 and 1864. In 1862 these boundaries were settled, and in 1864 this apparent settlement of all differences took place. Now was there anything to lead them to believe or suspect, or were they bound to suspect or to make inquiries as to whether these boundaries which had been so formally settled by the agents of the *West Hartlepool Company* in 1862 had been broken into or transgressed between 1862 and 1864? It now turns out, from the evidence of Mr. *Dixon* and Mr. *Gardner*, that the bounds were in point of fact broken and the coal abstracted in 1863. Mr. *Dixon* said it was all done before the 1st of January, 1864; that it began in 1863 and ended in 1863. At the time, therefore, when this correspondence was taking place, one side knew undoubtedly. The agents of the *Hunwick Colliery*, which is the *West Hartlepool Company*, knew perfectly well that they had broken the bounds, that they had worked the coal under *Councillor's Copyhold*, and under *Ward's Leasehold*, and under *Hunwick Lane*. Did they communicate that fact? That is not pretended. Did the other side know it? There is not a particle of evidence to shew they did. Mr. *Bristowe* says they ought to have made inquiry. Are you bound to make inquiry of your neighbour whether he has robbed you or not? If you

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have a neighbour and treat him as a respectable person who would not do so improper an act, I cannot conceive that there can be any necessity on the part of the Plaintiffs to make the inquiry, "Have you violated these boundaries which we settled in 1862? Did you in 1863, in defiance of all that, break the bounds and carry away 100,000 tons of our coal, and break our barrier so as to expose us to inundations from your colliery?" I cannot consider that reasonable diligence required it. Therefore, inasmuch as one party did know it, and might have communicated it and failed to do so, and the other party did not know it, I am of opinion there was nothing calling for inquiry on their part, and that there was no want of reasonable diligence in their not discovering, in 1864, that which they might have discovered. I think there was no necessity to take any steps of that kind; and, therefore, I cannot come to the conclusion which Mr. *Bristowe* desired I should do, that it might have been discovered with reasonable diligence.

There was one case I passed over which I intended to mention—the case of *Bonomi* v. *Backhouse* (1). That decides that where by the working of a colliery that had been done at a more remote period than six years, which caused an injury to occur within six years, the action could be maintainable within six years from the time of the injury being done. The questions put to the learned Judges by Lord *Westbury* were these:—"*A. B.* is the owner of a house; *C. D.* is the owner of a mine under the house, and under the surrounding land; *C. D.* works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can *A. B.* bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?" The learned Judges retired to consider the question, and the Lord Chief Baron then said: "My Lords, I am desired by my learned Brothers to deliver our unanimous opinion in reply to your Lordship's question. We are all of opinion that *A. B.* may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer Chamber." That was

(1) 9 H. L. C. 503. 7 Jur. N.S. 809

adopted by the House of Lords, and it was decided that the action was maintainable.

The case which Mr. *Bristowe* relied on in support of his argument was the decision of the case of *Denys* v. *Shuckburgh* (1), which I must say appears to me to lay down the very reasonable rule that you may maintain an action after the expiration of six years, if you did not know, or had not reasonable means of knowing, the fact. Six years will only be a bar when you have knowledge, or by reasonable diligence might have obtained knowledge. It resolves itself into a question of fact, whether there has or has not been a want of reasonable diligence in making the inquiry. For the reasons I have stated, there was no want of reasonable diligence in this case, and, therefore, this authority of *Denys* v. *Shuckburgh* does not apply.

But very great reliance was placed on the decision of Lord *Romilly*, the Master of the Rolls, in the case of *Dean* v. *Thwaite* (2). The case is, as Mr. *Glasse* says, very shortly reported, and the facts are very meagrely stated. They are these:—"The Plaintiff's estate adjoined that of the Defendant. The Defendant's husband, prior to his death in 1851, and the Defendant subsequently had, in working their own collieries, passed into and worked the Plaintiff's coal, and this, it was alleged, had been done since 1840. The Plaintiff filed the bill against Mrs. *Thwaite* and the representatives of her husband for an account of the coal thus improperly taken, and for payment of the value, and for an injunction." The time when this was discovered is not stated, and the circumstances are not stated. There is merely the broad fact that from 1840, this suit being heard in 1855, these workings into the Plaintiff's colliery had been going on. "Mr. *Roundell Palmer* and Mr. *Cairns*, for the Plaintiff, asked for a general account, contending that the *Statute of Limitations* did not apply to the case of a concealed fraud, and that time only ran from the discovery of the wrong." They cited *Brooksbank* v. *Smith* (3), *South Sea Company* v. *Wymondsell* (4), *Hovenden* v. *Lord Annesley* (5), *Booth* v. *Earl of Warrington* (6), and *Blair* v. *Bromley* (7), which was a case of

(1) 4 Y. & C. Ex. 42.
(2) 21 Beav. 621.
(3) 2 Y. & C. Ex. 58.
(4) 3 P. Wms. 143.
(5) 2 Sch. & Lef. 629, 630.
(6) 4 Bro. P. C. (Tom. Ed.) 163.
(7) 21 Beav. 622.

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fraud with regard to a trust fund. There the Master of the Rolls, on the facts stated, lays down a rule which I confess I cannot concur in. He says (1): "The question of liability with respect to the working of minerals under ground, which cannot be perceived in the same way as operations upon the surface, stands, in my opinion, in a very peculiar light; and it is very important to consider upon whom the burthen of proof lies in a case of this description. In my opinion the burthen of proof lies upon the wrongdoer to shew that the coal has not been taken from the Plaintiff's property within the time during which this Court would make him accountable for it. It was impossible for the Plaintiff to ascertain that fact; it was solely within the knowledge of the Defendants and their workmen." This seems to assume that the burthen of proof is on the wrongdoer, but it also seems to assume that if the wrongdoer proves that all the coal that was taken away was taken more than six years ago the Plaintiff has no remedy. That is too broad, in my opinion. If it was taken away more than six years ago, and the Plaintiff knew that, or had the means of knowing it, then it is very reasonable that the statute should be applied; but, according to this, although in the case I have suggested a man may have an estate which he believes to be untouched, and his neighbour may have robbed him more than six years ago, but he does not find him out, according to this decision he may rob him successfully, because the *Statute of Limitations* applies, and there is no remedy. That, in my opinion, lays down the rule far too broadly.

If Lord *Romilly* meant to say, Let him prove that it was done more than six years, and the Plaintiff knew it, then it is certainly in accordance with all the other decisions, and with my view of the case. His Lordship reserved his decision, and on the following day said: "I retain the opinion which I expressed yesterday, that an account ought to be directed, but that it must be confined to the coal gotten within six years before the filing of the bill." If that is laid down as an unqualified rule, it is one in which I cannot concur, but upon the whole I think the real ground upon which the Master of the Rolls refused to give more than an account for six years was that there was laches on the part of the

(1) 21 Beav. 622.

Plaintiff; that he either did know, or by reasonable diligence might have known, that the wrong had been done, and that he was guilty of that negligence which made it proper that the statute should run against him.

Upon these grounds I have come to the conclusion that this defence of the *Statute of Limitations* entirely fails the Defendants, and that there was no knowledge on the part of the Plaintiffs, nor any reasonable means of acquiring knowledge, and no omission to ascertain their rights, and no failure to resort to reasonable means of doing so; and I am therefore of opinion that although a wrong was done in 1863, inasmuch as it was not discovered till 1870, the bill was properly filed within six years from that time, namely, in 1872.

Now, with regard to the mode of discovery, it appears by the evidence that the owners of the *Newton Cap Colliery* in the ordinary prosecution of their business went on with their workings towards *Councillor's Copyhold* and *Ward's Leasehold*, and to this lane in question. When they got there, to their surprise they found the coal had all been worked out. There ought to have been between *Councillor's Copyhold* and the *Hunwick Colliery* a barrier of forty yards. That barrier had of course been worked through, in order to get into *Councillor's Copyhold*, and towards *Ward's Leasehold* the same, and *Hunwick Lane* the same. This led to a correspondence between the parties, and it was finally ascertained in 1870 that the coal had been worked under those lands, and that the bounds had been broken in the manner I have stated.

There is only one point I have passed over, which was this: I pointed out that the *North Eastern Company* acquired the right to these lands which the *West Hartlepool Company* had sold to *Lancaster* and *Brogden*, and that the *West Hartlepool Company* had received only a portion of the purchase-money in the shape of a deposit. The bulk of the purchase-money was received by the *North Eastern Company*. That seems to have been wholly unknown to the Defendants' advisers till Mr. *Borrett* produced the deed and read the recitals in it. The conveyance is dated the 8th of August, 1870, no less than six years after *Lancaster* and *Brogden* entered into possession, when, to my mind, it is clear they had not paid the purchase-money, because, if they had, they would

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undoubtedly have taken a conveyance of the estate. On the 8th of August, 1870, the receipt of the purchase-money of £20,000 and upwards was acknowledged by the railway company under their corporate seal in the usual way. The money was paid to them, and therefore it is clear they get the advantage of the purchase-money for this colliery. They had all the advantage except the deposit of £5,000 paid to the *West Hartlepool Company*, and with the property they must, in my opinion, take the burden, and take it subject to all contracts, liabilities, debts, and engagements affecting the same. The argument addressed to me by Mr. *Bristowe* was this: that because this was a wrongful act, therefore a purchaser from them ought not to be held liable. If that were so, Parliament would have done the greatest injustice, because the wrongdoers themselves have actually ceased to exist by Act of Parliament. Therefore, if the liability is not transferred to their transferees, the consequence is that there is a great wrong done, for which a suit can be maintained, but for which nobody is liable. To say that would be to say that Parliament has done an act of the grossest injustice by transferring the benefits to the Defendants and not the liabilities.

Upon the whole of the case, therefore, I have come to the conclusion, first, that the coal under these lands was originally part of the demise by the lease of 1846 to the Plaintiffs, the owners of *Newton Cap Colliery;* that it was erroneously placed on the map of the *Hunwick Colliery* as being within the boundaries of the *Hunwick Colliery;* that it was set right in 1862 by Mr. *Johnson*, in the manner he described in his evidence; and, with the knowledge of all parties, it was then ascertained to belong to the *Newton Cap Colliery*, and the *West Hartlepool Company* ought from that time to have been most anxious not to touch any of the coal of these lands. In defiance of that, it is proved to my satisfaction, that although it was done inadvertently, in 1863 this very land which they had acknowledged in 1862 to be part of the *Newton Cap Colliery* was entered upon, the bounds broken, and the coal worked out from it, for which, in my opinion, the *West Hartlepool Company* became liable, and if they were here now, I should not have a shadow of a doubt on the subject. It is also proved that the fact of the coal having been so worked and the boundaries broken was unknown

to the Plaintiffs until 1870, and that there was no want of diligence on their part in not discovering it at an earlier period. I am of opinion that the statute begins to run on this subject from the time of the discovery, which was in 1870, and the bill was filed in 1872. Therefore, in my opinion, all the defences that have been set up entirely fail, and the Plaintiffs have established their right to a decree in substance such as they ask, which is an account of the coal which has been improperly worked, and for the damages occasioned by breaking the barriers between the two collieries. Upon that subject, although much evidence was attempted to be given, and many observations made by Mr. *Bristowe* in his very able comments on the case, I have come to the conclusion that he has entirely failed to establish that there would be no danger to the *Newton Cap Colliery* from the breaking of those bounds, because I am satisfied that it is proved that the coal in the *Newton Cap Colliery* will last many years after the *Hunwick Colliery* is worked out and abandoned and left to nature. Therefore there will be very great danger of the water getting into the *Newton Cap Colliery*. It is not necessary for me to decide that question, the parties having agreed that if I should decide there is a case against the Defendants for an account of damages, instead of sending it to my Chambers to be inquired into, it shall be referred to some skilled person or persons to ascertain what damages have been sustained by the working of the coal and the breaking of the bounds.

I will only add this. I suppose I am right in saying that the real Plaintiffs are not the Ecclesiastical Commissioners, but their lessees, and that it may be a matter of some importance to them; but the Ecclesiastical Commissioners themselves are, I suppose, the greatest landowners in the country, and it would not be of much importance to them whether they have any damages or not; and I cannot help thinking they would act very reasonably if they would make a settlement of the matter without going any further.

Glasse:—Your Lordship will not make any distinction between the Plaintiffs on the face of the decree.

MALINS, V.C.:—No. I cannot. The Ecclesiastical Commis-

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sioners sue in respect of the injury to the reversion, and the other Plaintiffs in respect of the injury to the collieries.

Glasse:—I ask that the decree may be in the same form as in the *Llynvi Company* v. *Brogden* (1).

Williamson asked that the decree should be taken as in *Hilton* v. *Woods* (2), where, in assessing compensation for coal already gotten by the Defendant, the Court being of opinion that he had worked it inadvertently, and not fraudulently, held that he was to pay only the fair value of such coal as if he had purchased the mine from the Plaintiffs.

Glasse:—I cannot consent to any other decree than such as was made in the *Llynvi Company* v. *Brogden*.

MALINS, V.C.:—I was in hopes that the Plaintiffs would have consented to a decree as in *Hilton* v. *Woods*, but as they will not, it must be according to the *Llynvi Company* v. *Brogden*; therefore there must be an account of all coals and other materials worked by the *West Hartlepool Company* from the *Newton Cap Colliery* and the mines therein comprised, and the value of such coal at the pit's mouth, making to the Defendants all just allowances for the costs and expenses incurred by them in bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal. Then there must be an account of the damages sustained by the Plaintiffs by reason of the Defendants having broken through the boundary between their mine and the Plaintiffs' mine, and the Defendants must pay the costs of the suit up to and including the hearing, and the subsequent costs will be reserved. I understand that the parties are willing that the reference should be to some skilled person instead of to the Chief Clerk. That can be arranged out of Court. In form the reference will be to Chambers, but in substance I shall direct that the account shall be taken by some skilled person, and if the parties cannot agree on a name I shall select some person, as I have the power of doing.

Solicitors: *White, Borrett, & Co.*; *Williamson, Hill, & Co.*

(1) Law Rep. 11 Eq. 188. (2) Law Rep. 4 Eq. 432.

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1877
Feb. 23.

AMOS *v.* CHADWICK.

[1876 A. 108.]

ROBINSON *v.* CHADWICK.

[1876 R. 130.]

SMITH *v.* CHADWICK.

[1876 S. 166.]

Practice—Consolidation of Actions—Different Plaintiffs against the same Defendants—Rules of Court, 1875, *Order* LI., *r.* 4.

Order LI., rule 4, of the Rules of Court, 1875, adopts the old practice at Common Law, and the Court can only consolidate actions at the instance of Defendants, and not on the application of a number of different Plaintiffs against the same Defendants. But in such cases the Court may, under the general jurisdiction, enlarge the time for taking the next step in several of a series of actions till one of them has been tried as a test action.

Statement.

THIS was a motion by the Plaintiffs in seventy-eight separate actions, brought by different Plaintiffs against the same Defendants, asking that the actions might be consolidated, or that one of the actions, *Robinson* v. *Chadwick*, might be tried as a representative action, and that the proceedings in the other actions might be stayed, the Plaintiffs in all the actions undertaking to abide by such order as the Court might think fit to make on the determination of the representative action.

The Plaintiffs in the actions were persons who had subscribed for shares in a company called the *Blochairn Iron Company, Limited*, and the Defendants were the promoters of the company. The object of the actions was to make the Defendants personally liable for misrepresentations in the prospectus, on the faith of which the several Plaintiffs alleged that they had been induced to subscribe for their shares in the company.

The earliest of the actions in point of time was that of *Smith* v. *Chadwick*, in which the writ was issued on the 5th of May, 1876. It had been continued so far that statement of defence was delivered on the 9th of August, 1876. The Plaintiff had obtained time for delivering his reply, but the enlarged time was now exhausted.

V.-C. M. 1877 — AMOS v. CHADWICK. — ROBINSON. v. CHADWICK. — SMITH v. CHADWICK. — Statement.

The writs in the other actions were all issued on the 30th of June, 1876, and appearances to them were entered on the 11th of July following. In these actions no step had been taken beyond issuing the writ, and there were now pending in Chambers summonses for the purpose of staying the actions for want of prosecution.

The Plaintiffs were all represented by the same solicitors, and some negotiations had taken place between the solicitors with a view to arranging to have the actions consolidated, or one action tried as a test action; and on the 16th of December, 1876, the Plaintiffs' solicitors wrote to the Defendants' solicitors a letter, together with a definite proposal to effect this object. On the 1st of January, 1877, however, the Defendants' solicitors replied, declining the proposal, without stating any grounds for doing so.

The present application, so far as it asked to have the actions consolidated, was made under rule 4 of Order LI. of the Rules of Court, 1875.

Argument.

Glasse, Q.C., and *Romer*, for the motion:—

The object of this motion is to prevent the necessity of trying all the actions, the defence being necessarily the same in all cases. It is immaterial whether this object is effected by consolidating the actions or in some other way, such as by enlarging the time for taking the next step on a proper undertaking being given by the Plaintiffs. What is now required is similar in substance to the order made in *Foxwell* v. *Webster* (1); and if it is said that the rule as to consolidation strictly only affects applications by Defendants, the answer is that such a rule does not control the general discretion of the Court in staying proceedings in suits in which the same questions are being raised: *Daniell's* Chancery Practice (2). It was necessary to commence the other actions in order to prevent the Plaintiffs from being prejudiced by delay, which in the case of proceedings against companies is generally considered fatal to claims like these: *Reese River Silver Mining Company* v. *Smith* (3); *Taite's Case* (4); *Perrett's Case* (5); *Hey-*

(1) 2 Dr. & Sm. 250; 4 D. J. & S. 77. John Wilson & Co. 137.
(2) 5th Ed. p. 702.
(3) Law Rep. 2 Ch. 604; Ibid. 4 H. L. 64.
(4) Law Rep. 3 Eq. 795.
(5) Law Rep. 15 Eq. 250.

mann v. *European Central Railway Company* (1). Though a suit against the promoters may be in a different position from one against the company, yet a jury, if these actions came before them, would very likely take the question of delay into account in their verdict.

J. Pearson, Q.C., *Westlake*, Q.C., and *Russell Roberts*, for the Defendants:— Argument.

The rights of the Plaintiffs would not have been prejudiced by delaying the commencement of the actions. In the suits against companies the relief sought was that of being removed from the list of shareholders; the rights of creditors had to be considered. These Defendants could not escape any liability by the delay of the Plaintiffs. It is clear, therefore, that the proper course was not to have commenced any action except *Smith's* till after that action had been tried.

The rule is beyond dispute that actions cannot be consolidated at the instance of Plaintiffs: *Lush's* Practice (2). It rests on sound principle, because where a Plaintiff brings several actions against different Defendants, it is for his interest that they should be consolidated, so as to save the repetition of the trials. But where there are several Plaintiffs and the same Defendant, the same defence does not necessarily apply to all the actions. Here, for instance, the Defendants may want discovery from the several Plaintiffs to ascertain what facts were known in each case. In *Foxwell* v. *Webster* (3) there were several Defendants and the same Plaintiff.

MALINS, V.C.:— Judgment.

The object of this application is to obtain an order to stay proceedings in a number of actions pending the decision of one of them.

[His Lordship then referred to the facts on which the actions were founded, and continued:—]

There are circumstances alleged in the statements of claim in *Smith* v. *Chadwick* which, if proved, may induce the Court to

(1) Law Rep. 7 Eq. 154.
(2) Page 564.
(3) 2 Dr. & Sm. 250; 4 D. J. & S. 77.

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give relief. But for the present application, I shall proceed upon the assumption that these facts will be disproved and the actions dismissed.

The excuse for issuing the writs in the remaining actions is that if this had not been done, and the action of *Smith* v. *Chadwick* had succeeded, it would have been a fatal objection to the other Plaintiffs that they had allowed so long a period to pass without commencing any proceedings. I am very much inclined to think that this step was wholly unnecessary, because it would have been sufficient to offer to take *Smith* v. *Chadwick* as a representative action, and to postpone commencing the others till it had been disposed of. I think, therefore, that an erroneous step was taken in issuing the seventy-seven writs; but although I think this step to have been unnecessary, the mischief of taking it was done away with by the letter of the Plaintiffs' solicitors of the 15th of December, 1876, which, I think, contained a reasonable and proper proposal, which ought to have been accepted.

It appears, then, that the seventy-seven writs were issued for the purpose of avoiding the risk of prejudice to the Plaintiffs by delay. And I cannot see what injury the mere issue of the writs could do to the Defendants. But there are now pending seventy-seven applications to dismiss these actions for want of prosecution. That would be a preposterous thing to do. But, on the other hand, the Plaintiffs cannot be allowed to bring forward one Plaintiff after another, and so overwhelm the Defendants with a succession of actions. I propose, therefore, to frame the order I shall make on this summons in such a way that if the test actions fail, the Plaintiffs must dismiss the other actions; but if either of them succeeds, the Defendants may still be at liberty to defend the other actions. It is said that I have no power to do this, because Order LI., rule 4, under which the motion is made, applies only to the former practice of the Common Law Courts, under which actions could only be consolidated on the application of Defendants. This rule does not expressly apply to this case, but I think the Court has still a general discretion over the conduct of proceedings, and will find some means of exercising it. No harm can be done by staying the next step in the other actions; and if I have no power to make this order, I think I ought to

have it. But I think I have sufficient power, arising out of the general control which this Court always exercises over proceedings commenced here.

I see very plainly that to force on the continuance of the seventy-eight actions would be most oppressive and inexpedient, and I will exercise the general control which I have over all the proceedings in this branch of the Court, by extending the time for taking the next step in all the other actions till the actions of *Smith* v. *Chadwick* and *Robinson* v. *Chadwick* have been tried.

If there is any doubt as to what is the proper form of order, I think it is at least perfectly clear that when these summonses were taken out there was a discretion in the Court to extend the time for taking the next step. If the applications had been made in Court, I should have been able to exercise a discretion as to what time should be allowed. And it can make no difference as to this power that the applications were made in Chambers. I shall, therefore, direct the Chief Clerk to allow time sufficient for the trial of the test actions, and will exercise a beneficial control over the proceedings and not allow seventy-eight actions to proceed where two would be sufficient. I will, therefore, give the order in the form now asked for, and, on the Plaintiffs in all the other actions undertaking to prosecute with due diligence the actions of *Smith* v. *Chadwick* and *Robinson* v. *Chadwick*, and that those actions shall be treated as test actions, will direct that the time for taking the next step in those actions be enlarged till the test actions have been tried.

Solicitors: *Darley & Cumberland; H. T. Chambers.*

V.-C. B.

1877

Feb. 10.

In re NEW GAS GENERATOR COMPANY.

Winding-up—Defunct Company—Companies Act, 1862, *s.* 79.

A petition to wind up a company, which proved abortive, had never carried on business, never issued any shares, and owed no debts, by the administrator of one of the subscribers of the memorandum of association who was alleged, but not proved, to be a creditor of the company, was dismissed with costs.

Statement.

THIS was a petition for an order to wind up the *New Gas Generator Company, Limited*, presented by *Henry Wilson*, as the legal personal representative and creditor of *Paul Edward Bender*, deceased, who subscribed the memorandum of association in this company for 100 shares, and was also alleged to be a creditor of the company for £2300.

The company was registered in March, 1872, as a company for purchasing and working a patent for improvements in gas, with a nominal capital of £250,000 in 25,000 £10 shares.

It was provided by the articles of association that no allotment of shares should be made unless 12,000 shares at least were subscribed, and a deposit of £2 per share paid thereon.

Seven persons, of whom *P. E. Bender* was one, signed the memorandum and articles of association for 550 shares in the aggregate, but no shares were ever alloted, and the deposits had been returned to the subscribers. The company had never, in fact, commenced business, and the registered office was closed.

P. E. Bender died on the 3rd of May, 1873, and on the 6th of August letters of administration were granted to the Petitioner, *Henry Wilson*.

The sum of £2300, in respect of which the Petitioner, as administrator of *Bender*, claimed to be a creditor of the company, was stated to have been (as appeared from an entry in *Bender's* books) paid on behalf of the company in respect of preliminary expenses in advertising and publication of the prospectus. The existence of this debt was, however, denied by the secretary and other subscribers to the memorandum of association, and it did not appear

that any claim in respect of this alleged debt was ever made by *Bender* during his lifetime.

Hemming, Q.C., and *Oswald*, in support of the petition:—

Either to have his liability to the company, as representative of *Bender*, a subscriber to the memorandum of association for 100 shares, and to that extent a possible contributory, ascertained and determined; or in respect of the debt due from the company to *Bender* for preliminary expenses, the Petitioner is entitled to have this company, which has ceased to carry on business, and is unable to pay its debts, wound up. In the interest alike of the Petitioner and of all persons concerned, the Court has clearly jurisdiction, under the *Companies Act*, 1862, s. 79, to make the winding-up order, and formally abolish this abortive company, which has not commenced business within a year from its incorporation: *In re London and County Coal Company* (1). And this jurisdiction is not taken away by the fact that no money has been paid up, and that there are no debts: *In re Tumacacori Mining Company* (2); nor that only seven persons can be made liable as contributories: *In re Sanderson's Patents Association* (3).

Kay, Q.C., and *Whitehorne*, for three of the subscribers to the memorandum of association:—

The Court will not order a company, which for years past has been substantially at an end and has no assets and no outstanding debts or liabilities, to be wound up: *Ex parte Murrell* (4); *Ex parte Inderwick* (5). This company is entirely defunct, and has always been so treated. No shares have been issued, and there is no evidence of any existing debt. No liability, therefore, can possibly attach to *Bender* or his estate, while the debt alleged to be due to him is disputed and disproved by the evidence of the secretary and by the conduct of *Bender*, who never made any claim during his lifetime. The Court has discretion to refuse the order, especially when there are no debts for the liquidation of which there ought to be contribution, *Ex parte Wise* (6), and

(1) Law Rep. 3 Eq. 355.
(2) Ibid. 17 Eq. 534.
(3) Ibid. 12 Eq. 188.
(4) 3 De G. & Sm. 4.
(5) Ibid. 231.
(6) 1 Drew. 465.

V.-C. B. 1877 *In re* NEW GAS GENERATOR COMPANY. Argument.

will not allow the provisions of the Winding-up Acts to be turned into a mere machine for creating costs: *Re Natal, &c., Company* (1); *In re Sea and River Marine Insurance Company* (2).

William Barber, for other subscribers, followed on the same side, and mentioned that an appeal was presented in the case of the *Tumacacori Mining Company* (3); and although the appeal was not prosecuted the winding-up order was not drawn up, and was never acted upon.

Hemming, in reply:—

There is no authority for refusing shareholders the means of getting rid of their liability in the mode pointed out by the statute. In the cases cited in opposition there was no liability from which the Petitioner had to be protected; but here subscription to the memorandum of association creates just the same liability as taking shares. There is nothing to prevent the other subscribers to the memorandum from affecting to resume business and making calls on our shares. We will consent to a voluntary winding-up, and this is an answer to the suggestion that the petition is for costs.

Judgment.

BACON, V.C.:—

This petition is presented on two grounds: first, that the company has not done any business whatever since the year 1873, and in fact that it has never commenced its business. The objects for which the company was formed have failed; the company has suspended its business for more than a space of a whole year, its registered offices cannot be found, and the company is unable to pay its debts.

Secondly, that the Petitioner is a creditor of the company. The case has been argued on both grounds. As to the first, which is directed towards that discretion of the Court which the statute imposes on it, it is of general public importance when the Court is called on to exercise its equitable authority that it must be satisfied that there is some rational ground for its interference,

(1) 1 H. & M. 639. (2) Law Rep. 2 Eq. 545.
(3) Law Rep. 17 Eq. 534.

a reason for incurring the costs which are the effects of making an order on the petition, and the prospect of some good being done to somebody; and if the Court is satisfied of that, of course it will make an order for winding up.

But what necessity exists in this case? It is undisputed that the company has come to an end. Shares were never allotted; subscribers who had agreed to take shares have had their deposits paid back to them. The contracts with the vendors of the patent had been given up. No business had been carried on, and no business can by any possibility be carried on, and the Petitioner, with an affectation which I cannot listen to with any kind of seriousness, says he is under liabilities, for those persons forming the registered company may hereafter issue shares, and in his character of administrator of Mr. *Bender* he may be exposed to liability. That is impossible, for there is no company. Whether it has been formally wound up or not does not signify. The company which entered into an agreement to purchase patents to carry on a business, has rescinded that contract, and no longer has any patent, and has not assets to the amount of a hundredth part of a farthing, which, moreover, owes no debt, although that is the other ground, which I must deal with presently. It is said that the Petitioner comes trembling to the Court to ask for its protection against the damages to which he is exposed. It is impossible to entertain it. The books may be ransacked, and cases found in which there is more or less similitude, but no case can be found where the Court has, under any circumstances at all approaching this, made an order to wind up, unless there has been some fraud which the winding-up might succeed in detecting. In all the cases, and in that of the *Tumacacori Mining Company*, before Vice-Chancellor *Malins*, the fraudulent conduct of the directors formed the ground of the decision; but it seems, from what Mr. *Barber* tells me, that that order was thought so erroneous, or of so little worth, that, on an appeal being presented, the matter was compromised, and there was no attention paid to it, so that I could not adopt it as an authority. In all the other cases there had been fraud, and the Court was induced, under the circumstances appearing in those cases, to extinguish the wretched thing (to use Vice-Chancellor *Wood's* expression in the *London and*

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County Coal Company (1)). But here the wretched thing has extinguished itself, and is not in existence. And for no earthly purpose but to put costs into the pocket of the solicitor who presented the petition, could the order be made.

Now the other ground is covered, and just as much extinguished as the other was by the facts deposed to by competent witnesses. [His Lordship, after deciding upon the evidence that there was no ground upon which the Petitioner could be called a creditor of the company, continued:—]

I do not entertain the slightest doubt that it is my plain duty to dismiss this petition, which is, in my opinion, presented solely to produce the effect of creating costs and prolonging a litigation which never ought to have existed.

Solicitor for Petitioner: *F. Bradley.*
Solicitor for Company: *J. D. Blake.*
Solicitors for other Parties: *Tamplin, Tayler, & Joseph.*

(1) Law Rep. 3 Eq. 355.

In re DENDY.

V.-C. H.
1877
Feb. 2.

Settled Estates Act, 1856 (19 & 20 *Vict. c.* 120), *ss.* 1, 17—*Settled Estates (Amendment) Act*, 1874 (37 & 38 *Vict. c.* 33), *s.* 2—*Life and Absolute Interests — Settlement — Children Beneficiaries — Service of Petition on Father.*

By will real property was vested in trustees upon trust for *J.* for life, and after her death for the benefit of her children, and in default of any, for *S.* and *E.*, but if either should die without leaving issue who should attain twenty-one, in trust for the survivor absolutely. *J. S.* and *E.* had a power of appointment, and liberty to sell and convert any part of the property. *E.*, on her marriage, settled her real and personal estate. She had now four children infants. *J.* was living and unmarried. A conditional contract had been entered into for the sale of a part of the property. On a petition by the trustees and *J.* under the *Settled Estates Act*, 1856 :—

Held, that the children of *E.* were necessary parties, and that notice of the petition must, under sect. 2 of the *Settled Estates (Amendment) Act*, 1874, be served on their father.

Statement.

STEPHEN DENDY, who died in April, 1861, by his will in March, 1861, gave his manors, messuages, and hereditaments in the parish of *Leigh*, to trustees upon trust to permit his daughter *Jane* to receive the rents and profits during her life, and after her decease, for the benefit of her children, as she should appoint, and in default of children, upon trust for his daughters, *Ellen Sarah*, the wife of *D. Watney*, and *Elizabeth*, but if either of them should die without leaving issue who should attain twenty-one years of age, then in trust for the last surviving daughter and her heirs. The testator, who was possessed of rights and claims of common in the manor of *Banstead*, gave to his daughters a power of appointment, and declared that they should be at liberty to direct the sale and conversion of all or any part of the hereditaments to which such power of appointment should extend. In October, 1864, *Elizabeth* married *J. Watney*, and a settlement was executed by which certain funds were settled upon trusts for the benefit of the intended wife and husband for their lives and the life of the survivor, with remainder to the children of the marriage; and the settlement contained a covenant to convey to the trustees any real or personal estate of the intended wife which should come to her

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or *J. Watney* in her right during the coverture, upon trust for sale and conversion, and to hold the purchase-moneys upon the same trusts as the funds thereby settled.

Statement.

J. and *E. Watney* had now four children living, all under twenty-one years of age.

A conditional contract, dated the 2nd of August, 1876, was entered into for the sale of the above-mentioned rights of common to Sir *J. W. C. Hartopp* for the sum of £5737 10*s.*; and this was a petition under the *Settled Estates Act*, 1856 (19 & 20 Vict. c. 120), by the trustees of the will, and by *Jane Dendy* for the approval of the contract.

Argument.

Dickinson, Q.C., and *Nugent*, for the Petitioners, stated the facts.

A. T. Watson, for the Respondents, *Ellen Sarah* and *Elizabeth*, and their husbands:—

The children of *J.* and *E. Watney* have, I submit, a beneficial interest, and are therefore necessary parties under sect. 17 of the Act of 1856, and I would suggest that notice should be served on the father of the children under the *Settled Estates* (*Amendment*) *Act*, 1874, by sect. 2 of which it is enacted that "where, under the principal Act, the concurrence or consent of any person in or to any application hereafter to be made under that Act is required," and it has not been obtained, "notice shall be given to such person in such manner as the Court" . . . "shall direct, requiring him to notify within a time to be specified in such notice, whether he assents to or dissents from such application, or submits his rights or interests," . . . "to be dealt with by the Court; and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court." In *In re Ives* (1), it was held that the children were necessary parties; and I may state that in that case the Master of the Rolls declined to follow the decision in the case of *In re Pott's Estate* (2),

(1) 3 Ch. D. 690. (2) Law Rep. 16 Eq. 631, n.

V.-C. H. 1877 *In re* DENDY.

but which was followed by Vice-Chancellor *Malins* in the case of *In re Strutt's Trusts* (1). I submit that a notice can be served, as was done in *In re Crabtree's Settled Estates* (2).

Argument.

Dickinson:—That is not necessary, as the children's claims are under a settlement which is really only a sub-settlement.

Watson:—The definition of the word "settlement" in sect. 1 of the *Settled Estates Act*, 1856, is, "any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure, or any estates or interests in any such hereditaments, stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively;" and I submit that these children are necessary parties.

Judgment.

HALL, V.C.:—

I hold that these children are beneficiaries, and that their consent is necessary, and I am of opinion that the trustees are not, and would not be even if their interest was one in possession within the meaning of the Act, the proper persons to represent them. I shall direct that the petition be amended by intituling it in the *Leases and Sales of Settled Estates* (*Amendment*) *Act*, 1874 (37 & 38 Vict. c. 33), and stating the trusts of the settlement made on the marriage of *J.* and *E. Watney*; and making these children Respondents; and I shall direct that notice of the amended petition shall be served on the children by delivering a copy of it to their father, who must signify his assent or dissent within ten days from such service, and in default of his doing so he will be deemed to have submitted to the order of the Court.

Solicitors: *Randall & Angier*; *Parkers*.

(1) Law Rep. 16 Eq. 629. (2) Law Rep. 10 Ch. 201.

V.-C. H.
1877
Feb. 19.

GREEN *v.* CARLILL.

[1875 G. 9a.]

Legacy to Separate Use of Wife—Country Draft on London Bankers—Indorsement to Husband—Payment to Husband's Deposit Account—Death of Husband—Claim by Widow against Executors.

M. G., to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in *London*, for the amount, less the duty, and she indorsed the draft and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the cheque to her husband. In an action against his executors:—

Held, that the widow was entitled to be paid the sum claimed.

Statement.

IN May, 1873, *Mary Green*, the wife of *Stephen Green*, of *Clapham Park*, became entitled, under the will of a late aunt, to a legacy of £2500, less the duty, which was bequeathed to her for her separate use. On the 21st of May, 1874, Mrs. *Green* received from her late aunt's executors a draft in this form:—

"No. H. S. 314, *West Riding Union Banking Company*, £2425.

"*Huddersfield*, 19th May, 1874.

"On demand pay to the order of Mrs. *Mary Green* Two thousand four hundred and twenty-five pounds value received.

"For the Directors and Proprietors,

"*Jno. G. Bury*,

"The *London and Westminster Bank*, "Manager.

"*Lothbury, London.*"

There was written across the face of the draft the words "not exceeding twenty-four hundred and twenty-five pounds."

Mrs. *Green* having written on the back of the draft the words

"Indorsed,

"Pay Mr. *Stephen Green*,

"*Mary Green*,"

handed it to Mr. *Green*, who wrote his name underneath his wife's,

and he, on the same day, paid it in to his account at the *London Joint Stock Bank* thus:—

"Credit *Stephen Green.*

"*West Riding Union Banking Company,* £2425 0*s.* 0*d.*

"Please place the above to my deposit account.

"*Stephen Green.*

And he also drew a cheque, "Pay to deposit account," on that bank for the sum mentioned above. The original draft was not crossed, and consequently it might have been paid to Mrs. *Green* in person at the *London and Westminster Bank,* or, after her indorsement, to the bearer. It was not necessary that a banker should collect it, nor was it necessary for Mrs. *Green* to write "Pay Mr. *Stephen Green.*" A few days after paying the cheque Mr. *Green* shewed his wife the deposit note, and told her what he had done with the money. He also made an entry recording the fact of the deposit in a memorandum book in which he kept an account of receipts and payments, but this entry was in red ink, while all the other entries were in black ink. Mr. *Green* died suddenly on the 1st of June, 1874. Mrs. *Green* brought this action against the executors of her late husband, claiming that the husband might be declared to have been a trustee for her, and that his executors might be ordered to pay to her the sum above mentioned. In her evidence *viva voce* she deposed that she never intended to make a gift of the draft to her husband, and on cross-examination she stated that on the day upon which she received the draft she told her husband that she would like to have the money settled upon herself, and that he replied, "Not with my consent;" that she then said, "she would like to be able to will it away;" but nothing more was done or said about it. Mrs. *Green* further stated that she knew her late husband had always entertained a great dislike to settlements. The action, though not hostile, was necessary, as the executors considered that they could not pay the money to the widow, even if she were entitled to it, without the sanction of the Court. It appeared in evidence that Mrs. *Green* had been entitled to a sum in a cause, and that she sanctioned the payment of it to her husband.

V.-C. H. 1877 GREEN v. CARLILL. Argument.

Hastings, Q.C., and *Fellows*, for the widow, stated the facts, and submitted that the draft was not handed over by her to her late husband for his own benefit, but only that he might, more conveniently than she could herself, obtain payment of the money for her.

Dickinson, Q.C., and *Nalder*, contended that there had been by the indorsement and the handing over a complete parting with the draft in favour of the husband. They referred to *Woodward* v. *Woodward* (1).

Macnaghten, for the executors.

Judgment.

HALL, V.C.:—

I am of opinion that there was not enough done to make this draft, which was separate estate, the property of the husband. It was not convenient to the Plaintiff to receive the money herself, and she, having first indorsed the draft, got her husband to receive the money for it. There is no evidence to shew that the Plaintiff desired to part with the absolute control over the money, but I think the evidence is clearly the other way. The declaration will be that the Plaintiff is entitled to be paid the money claimed.

Solicitors: *Evans, Foster, & Rutter; Collyer-Bristow, Withers, & Russell*, agents for *Carlill, Hull; J. G. Hepburn & Sons.*

(1) 3 D. J. & S. 672.

BARBER *v.* WOOD.

V.-C. H.
1877
Feb. 20.

[1876 B. 79.]

Devise of Real Estate—Misdescription—Intestacy.

Testator devised his freehold property at *M.* in trust for his children, a son and daughter, equally. He had no freehold property at *M.*, but he had two undivided fourth shares of some in *R.*, which *M.* adjoined, and in which parish it was situate:—

Held, that the property in *R.* descended to the heir-at-law.

Statement.

WILLIAM BARBER, of *Hoyland Nether*, who died on the 16th of June, 1869, by will, dated the 15th of that month, after directing that all his just debts, funeral and testamentary expenses, should be paid by his executors, said: "I give and devise all my freehold property in *Hoyland* aforesaid, as well as my personal property, and also my freehold property at *Masbro'* and property at *Thorpe Hesley*, to" two trustees named, whom he also appointed executors, "in trust for my two children, *Ann Elizabeth Barber* and *William Barber*, share and share alike, the aforesaid property to be sold and divided as my children may agree when my youngest child, the aforesaid *William Barber*, may attain his twenty-first year." The trustees were to receive the rents, and other moneys due to the testator, and to apply the same in maintaining the children, and the balance was to be invested for their sole benefit. The testator was never seised of any freehold property at *Masbro'*, but at the dates of his will and death he was seised of two undivided fourth shares of certain freehold property in *Rotherham* to which *Masbro'* adjoined, and in the parish of which *Masbro'* was situate. The personalty was stated to be insufficient to pay the debts.

This was an action for administration by the infant son by his next friend.

Argument.

Romer, for the Plaintiff, after referring to the cases of *Miller* v. *Travers* (1), *Stanley* v. *Stanley* (2), and to *Jarman* on Wills (3),

(1) 8 Bing. 244. (2) 2 J. & H. 491.
(3) 3rd Ed. vol. i. p. 413.

V.-C. H. 1877 BARBER v. WOOD.

submitted that there was nothing to be gathered from the will that the testator intended to devise property in *Rotherham* under the description of his freehold property at *Masbro'*; and that there was a fatal misdescription and an intestacy.

Argument.

Dunning, for the Defendants, the executor, and the infant daughter, argued that if it should be held that the property in *Rotherham* did not pass by this devise under the description of his freehold property at *Masbro'*, it would be cutting out a part of the will. The misdescription, if any, was very small, as *Masbro'* was in fact a part of *Rotherham*.

Judgment.

HALL, V.C.:—

I am of opinion that the view contended for by Mr. *Romer* is the right one, and therefore I hold that this property descended to the infant heir-at-law, but it must be the first real estate to be applied in payment of debts, in case there be a deficiency in the personalty.

Solicitors: *Bell, Brodrick, & Gray*, agents for *Badger & Rhodes, Rotherham.*

END OF VOL. IV.

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ADMINISTRATION — *Costs — Residue.*] Where there is a gift of residue to be divided among certain persons and classes of persons, the costs of ascertaining of whom such classes consist are payable out of the whole residue before the same is divided. *In re* REEVE'S TRUSTS - - 841

2. —— *Costs—Liability of Executors—Partial Distribution before Suit—Mistake—Incorrect Accounts.*] Where executors have made a proper distribution *pro tanto* of their testator's estate, and have been ready to produce proper accounts to the unpaid residuary legatees, and an administration action is then instituted by the unpaid residuary legatees, and it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it.—But where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; and, secondly, in expending part of the general personal estate in repairs of property specifically devised:—*Held*, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each.—Form of Order. HILLIARD *v.* FULFORD - - - - - 389

3. —— *Costs—Residue—Lapsed Share.*] A testatrix bequeathed her residuary personal estate to four persons. One of the shares lapsed through the death of the legatee in the testatrix's lifetime:—*Held*, that the costs of a suit for the administration of the testatrix's estate were payable out of the residue generally, and not primarily out of the lapsed share.—*Dictum* of *Malins*, V.C., in *Gowan* v. *Broughton* (Law Rep. 19 Eq. 77) dissented from.—"Residue" of personal estate means the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of the administration of his estate, including the costs of an administration suit. TRETHEWY *v.* HELYAR - 53

4. —— *Deficient Estate — Unclaimed Divi-*

ADMINISTRATION—*continued.*

dends—Funds subsequently coming in.] Where a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the latter period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts. ASHLEY *v.* ASHLEY - - - - - - 757

5. —— *Locke King's Act* (17 & 18 *Vict. c.* 113) — *Bequest of Leaseholds — Mortgage thereon.*] Leaseholds are not within *Locke King's Act.*—*Solomon* v. *Solomon* (33 L. J. (Ch.) 473) approved. *In re* WORMSLEY'S ESTATE. HILL *v.* WORMSLEY [665

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BANKRUPTCY — *Adjudication of Bankruptcy—Tender of Petitioning Creditor's Debt—Discretion of Judge to refuse to adjudicate—Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 7, 8, 31.] On the hearing of a petition for adjudication of bankruptcy, founded on default in appearance to a debtor's summons, after the debt and act of bankruptcy had been proved, the hearing was adjourned till the next day with the consent of the solicitor of the petitioning creditor, in order that the debtor might make arrangements to pay not only the petitioning creditor's debt, but also the debts of other creditors who were represented by the same solicitor. At the adjourned hearing the debtor tendered the amount of the Petitioner's debt only and costs, which were refused by the petitioning creditor. The Registrar accordingly made the order for adjudication:—*Held,* on appeal, that the Registrar was right in making the order.—*Semble,* there may be cases in which the Court may refuse to make an order for adjudication, after a tender of the debt and costs, although the petitioning creditor refuses to accept them, and insists on his right to adjudication. *Ex parte* BRIGSTOCKE. *In re* BRIGSTOCKE - - 348

BANKRUPTCY—*continued.*

2. —— *Bill of Sale—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt — Concurrent Possession by Grantee and Trustee in Bankruptcy of Grantor—Forcible Removal of Property by Grantee—Contempt of Court —Business of Deceased Trader carried on by Executor—Implied Trust of Assets for Benefit of Testator's Creditors.*] The grantee of a bill of sale and the trustee in bankruptcy of the grantor were in concurrent possession of the property comprised in it. The grantee had taken possession first. The trustee impeached the validity of the bill of sale. Before the question of its validity had been decided, the grantee forcibly removed part of the property:—*Held*, that, notwithstanding the fact that the grantee had taken possession first, the removal was an unlawful act, and that the grantee must pay the trustee's costs of a motion (which had been refused in the County Court) to compel the restoration into the joint possession of the property which had been removed.—The executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own:—*Held* (reversing the decision of the County Court), that the assets of the business in the hands of the executrix were not impressed with any trust in favour of the testator's creditors, and consequently that, on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been converted, passed to her second husband. *In re* Fells. *Ex parte* Andrews - - - - - 509

3. —— *Bill of Sale—Registration—First Bill of Sale not registered—Second Bill of Sale registered—Bankruptcy of Mortgagor—Rights of Trustee—Bills of Sale Act*, 1854, *s.* 1.] A bill of sale of chattels was executed but not registered. The mortgagor executed a second bill of sale of the same chattels to another person, which was registered. Afterwards the mortgagor filed a liquidation petition:—*Held* (affirming the decision of the Chief Judge), that the second mortgagee was entitled to such of the chattels as had not been seized by the first mortgagee before the liquidation. *Ex parte* Leman. *In re* Barrand - 23

4. —— *Bill of Sale—Registration—Fixtures—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] A lease of a piece of land was granted to a trader, he covenanting to build upon it a steam saw-mill, messuages, or dwelling-houses, and at the end of the term to yield up to the lessor the land, buildings, and fixtures, except the steam saw-mill, machinery, fixtures, and things connected therewith, which it was agreed the lessee might remove. The lessee afterwards mortgaged the property, the mortgage deed assigning the land, together with the steam saw-mills and buildings thereon, and the steam-engines, boilers, fixed and moveable machinery, plant, implements, and utensils fixed to, placed upon, or used in or about the ground, hereditaments, saw-mills, and buildings, to hold the hereditaments, and such of the machinery, plant, &c., as were in the nature of landlord's fixtures, to the mortgagee for the residue of the term, and as to such of the machinery and premises as were in the nature of tenants' or trade fixtures to the mortgagee absolutely, subject

BANKRUPTCY—*continued.*

to redemption.—The deed contained a power for the mortgagee, in default of payment of the mortgage money, to sell the premises, or any part or parts thereof, either together or in parcels. The deed was not registered under the *Bills of Sale Act*. The mortgagor filed a liquidation petition. The mortgage money remained due. The mortgagee had not taken possession of any of the property comprised in the deed:—*Held*, that the effect of the deed was to authorize the mortgagee to sever the trade fixtures from the premises, and to deal with them separately, and consequently that the deed, not having been registered under the *Bills of Sale Act*, was void *quâ* the trade fixtures as against the trustee in the liquidation. *In re* E. Eslick. *Ex parte* Alexander - 503

5. —— *Bill of Sale—Registration—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt and Fresh Advance—Agreement not to register, but that new Bill of Sale should be given when required by Grantee—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36.] A trader gave to one of his creditors a bill of sale of all his property to secure a then existing debt and a fresh advance. It was verbally agreed that the bill of sale should not be registered, but that the grantor should give a new bill of sale in substitution for the first when required to do so by the grantee. More than two months before the grantor filed a liquidation petition a new bill of sale was given, and was registered, and the grantee put a man in possession of the property. But the grantor's name remained on the premises as the ostensible occupier of them:—*Held*, that, there having been a sufficient fresh advance when the first bill of sale was given, the substituted bill of sale was good as against the trustee in the liquidation.—*Ex parte Cohen* (Law Rep. 7 Ch. 20) and *Ex parte Stevens* (Law Rep. 20 Eq. 786) distinguished. *In re* Jackson. *Ex parte* Hall [682

6. —— *Bill of Sale—Validity—Illegal Consideration—Compounding a Felony—Stifling a Prosecution.*] In January, 1875, *M.*, who then owed *B.* £100, for which he had given no security, wrote to *B.* telling him that he had forged his name to a bill of exchange for £100, which he had discounted with his bankers; that the bill was just due and that he was unable to meet it; and entreating *B.* to pay the bill, and thus save him and his family from the ruin which would result from exposure. *M.* promised, if *B.* would do this, to give him a bill of sale of all his property to secure what he owed him. *B.* acceded to the request; a bill of sale of all *M.*'s property was given to him to secure £200, and *B.* paid the £100 to the bankers. Soon afterwards *M.* was adjudicated a bankrupt:—*Held*, by the Chief Judge, that the transaction amounted to the compounding of a felony, that the bill of sale was void as against the trustee in the bankruptcy, and that *B.* must pay over the proceeds of the goods to the trustee.—*Held*, on appeal, that, however difficult on grounds of public policy the position of *B.* might have been if he had been seeking the assistance of the Court, *M.*, who was a party to the offence, if any, could not have recovered the proceeds of the goods from *B.*; and that as no offence

BANKRUPTCY—*continued.*

against the bankrupt law had been committed, the trustee had only the same rights as *M. In re* Mapleback. *Ex parte* Caldecott - - 150

7. —— *Composition — Enforcing Payment — Money placed in Hands of Debtor's Solicitor — Trust on behalf of Creditors—Solicitor's Lien for Costs.*] The creditors of a debtor who had filed a liquidation petition resolved to accept a composition, payable in two instalments, the second instalment being secured by the joint and several promissory note of two sureties. No trustee was appointed. The debtor's solicitor registered the resolution, and he, by means of money supplied to him by the debtor, paid the creditors the first instalment. A sum sufficient to provide for the payment of the second instalment was placed in the solicitor's hands, partly by the debtor, but mainly by one of the sureties. The debtor gave the surety a bill of sale as security for the amount which he advanced. The solicitor sent a circular to the creditors, stating that he should be prepared on a specified day to pay them the second instalment at his office. He after this paid some of the creditors, but most of them were left unpaid. One of the latter applied to the Court for an order that the solicitor should pay him. The solicitor claimed a lien on the moneys in his hands for costs due to him by the debtor, who had absconded:—*Held*, that the solicitor had constituted himself a trustee of the money for the creditors, and that the Court had jurisdiction to order him to pay the applicant his proportion of the second instalment, which he was accordingly ordered to pay, with the applicant's costs. *In re* Clark. *Ex parte* Newland - - 515

8. —— *Composition—Registration of Resolutions—Power of Majority of Creditors to bind Minority—Bona fides—Resolutions passed for the Benefit of the Debtor—Power of Court to summon a fresh First Meeting.*] The statement of affairs of a debtor who had filed a liquidation petition shewed that his debts amounted to £11,358, while his assets were only £75. Of the debts, the preferential claims amounted to £127. The creditors, by the proper statutory majority, resolved to accept a composition of 1*s.* in the pound, to be paid within one month after registration of the resolution, no security for its payment being offered. One of the dissentient creditors opposed the registration:—*Held* (affirming the decision of the Registrar, sitting as Chief Judge), that the resolution could not have been passed in the interest of the creditors, but must have been passed for the benefit of the debtor; that it therefore was not binding on the dissentient minority, and that the Registrar was right in refusing to register it:—*Held*, also (affirming the decision of the Registrar), that the Court had power to direct a fresh first meeting of the creditors to be summoned for the purpose of the debtor's offering a fresh composition, to be secured to their satisfaction.—The power to direct a fresh meeting to be summoned extends not only to a case where, through accident or mistake on the part of the debtor, no valid resolution has been passed, but also to a case where, owing to a mistake on the part of the creditors, or from any other cause, no valid resolution has been passed. *In re* Terrell. *Ex parte* Terrell.

BANKRUPTCY—*continued.*

Ex parte Sheffield and Rotherham Joint Stock Banking Company - - - - 293

9. —— *Debtor's Summons—Disputed Debt—Staying Proceedings — Security — Discretion of Judge—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Bills of Exchange Act*, 1855 (18 & 19 *Vict. c.* 67), *s.* 2.] A debtor's summons was founded upon a bill of exchange. The summoning creditor had, before the hearing of the summons, commenced an action against the debtor upon the bill, which the debtor had obtained leave to defend without giving any security. He had then pleaded want of consideration. They now also alleged that the holder had notice of the want of consideration:—*Held*, that, having regard to these facts, the proceedings upon the summons ought to be stayed pending the trial of the action, without security being required from the debtor. *In re* Latham. *Ex parte* Latham - - 105

10. —— *Examination of Creditor—Bankruptcy Rules*, 1870, *r.* 166.] A debtor became bankrupt in 1872, and in 1875 his assets were found sufficient to pay in full all creditors who had proved, and to leave a considerable surplus, but no dividend had yet been paid. In November, 1875, *G.*, the personal representative of a mortgagee who had obtained in 1869 an absolute order for foreclosure, came in to prove for £21,000, the balance of the mortgage debt, after deducting the estimated value of the property. Supposing this proof admitted, the assets were not sufficient to pay the creditors in full. The trustees, with the sanction of the committee of inspection, made an arrangement with *G.* to admit the proof at £20,000 on the terms that he was to receive nothing till the other creditors had received 18*s.* in the pound, after which he was to receive 18*s.* in the pound, and after this all the creditors, including *G.*, were to rank *pari passu*. The bankrupt then applied for an order to have a private sitting appointed for the examination of *G.*, which was refused by the Registrar, sitting as Chief Judge:—*Held*, on appeal, that, under the peculiar circumstances of the case, the bankrupt ought to have an opportunity of investigating the claim, and that an order ought to be made for the examination of *G.* *Ex parte* Austin. *In re* Austin - - 13

11. —— *Execution against Trader for Sum exceeding £50—Possession Money—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.] In ascertaining whether, under sect. 87 of the *Bankruptcy Act*, 1869, an execution against a trader is for a sum exceeding £50, possession money may be included if the sheriff is compelled to take possession.—Observations on *Howes* v. *Young* (1 Ex. D. 146). *In re* Grubb. *Ex parte* Sims - - 521

12. —— *Fraudulent Preference — Stock Exchange Rules.*] An assignment of part of the property of a man who is unable to meet his engagements to a trustee for a special class of creditors is not prevented from being a fraudulent preference by any amount of pressure.—According to the rules of the *Stock Exchange* a member who is unable to meet his engagements on the *Stock Exchange* is declared a defaulter, ceases to be a member, and cannot be re-admitted unless he pays 6*s.* 8*d.* in the pound on his *Stock Exchange* debts. According to the same rules

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his *Stock Exchange* assets are collected by the official assignees of the *Stock Exchange*, and distributed among the *Stock Exchange* creditors. A member who had been declared a defaulter attended the usual meeting of the *Stock Exchange* creditors and gave to the official assignees, for distribution among his *Stock Exchange* creditors, a cheque on his bankers for £5000, being about five-eighths of his assets, stating at the same time that he had none but *Stock Exchange* creditors. On the day after this sum had been distributed the debtor informed the *Stock Exchange* creditors that his father-in-law claimed to be a creditor for a large amount for money lent. It did not appear that up to this time the debtor had committed any act of bankruptcy, but soon afterwards he filed a liquidation petition, and was adjudged bankrupt:—*Held* (reversing the decision of the Registrar), that the trustee in bankruptcy was entitled to recover the £5000 from the official assignees of the *Stock Exchange*. *Ex parte* Saffery. *In re* Cooke - - **555**

13. —— *Liquidation Petition — Change of Place of Meeting mentioned in Debtor's Affidavit—Invalidity of Resolutions — Registration — Fresh first Meeting—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 82, 125—*Bankruptcy Rules*, 1870, *rr.* 208, 252, 254, 256, 259, 295 — *Bankruptcy Forms*, 1870, *Nos.* 107, 108, 112.] The affidavit of a debtor filed with his liquidation petition stated that *Stone* would be the most convenient place for the meeting of the creditors, but the notices sent out by the Registrar to the creditors summoned them to meet at *Stafford*:—*Held*, that, as no formal order had been made by the Court to change the place of meeting mentioned in the affidavit, the proceedings were invalid, and that the resolutions passed by the creditors could not be registered. But leave was given to the debtor to summon a fresh first meeting. *In re* Mayer. *Ex parte* Lewis - - - **519**

14. —— *Order and Disposition — Chose in Action — Debenture of Company — Indorsement in Blank — Equitable Assignment — Notice to Company—Debts due to Bankrupt in the Course of his Trade — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.] A debenture of a joint-stock company, by which the company undertake to pay a sum of money, with interest, and charge their undertaking and property with the payment thereof, is a *chose in action* within the meaning of sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869.—An assignment of such a debenture by indorsement in blank confers a good title on the assignee as against the trustee in bankruptcy of the assignor, notwithstanding that the assignee gives no notice to the company until after the commencement of the bankruptcy. —The words "debts due to the bankrupt in the course of his trade" in sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869, do not extend to all debts due to the bankrupt during the period of his trading, but include only debts connected with the trade. *In re* Pryce. *Ex parte* Rensburg [**685**

15. —— *Order and Disposition—Withdrawal of Consent of True Owner—Bill of Sale of Goods in two separate Houses—Possession of Goods in one House taken before Notice of Act of Bankruptcy.*] A trader executed a bill of sale of his stock-in-trade in his shop and his furniture in his dwelling-house to secure a debt. The shop and the dwelling-house were situate in different streets in the same town. An agent of the bill of sale holder took possession of the stock-in-trade just before the debtor filed a liquidation petition, but he did not take possession of the furniture till after he had received notice of the filing of the petition:—*Held*, that the possession taken of the stock-in-trade operated as a withdrawal of the consent of the mortgagee to the furniture remaining in the debtor's order and disposition.—The day before the possession was taken the mortgagee had instructed his agent to go and take possession of the property.—*Semble*, that the giving of these instructions amounted to a withdrawal of the mortgagee's consent to the property remaining in the debtor's order and disposition. *In re* S. J. Eslick. *Ex parte* Phillips. *Ex parte* Alexander - - **496**

16. —— *Proof—Building Contract—Failure to complete in Time—Penalty—Liquidated Damages —Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 31—8 & 9 *Will.* 3, *c.* 11, *s.* 8.] A contract for the erection of buildings provided that they should be completed by the 25th of December, and that in default thereof the contractors should forfeit to the employer £10 per week for every week after that date during which the buildings should remain unfinished; also that, if the contractors were prevented by bankruptcy or any other cause from completing, the employer might rescind, and that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, and a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1000, as and for liquidated damages.—Before the 25th of December the contractors filed a liquidation petition. Their trustees carried on the works for a time, and then abandoned the contract. Another builder was employed to complete the works, which were not finished till long after the 25th of December:—*Held*, that the £1000 was in the nature of a penalty, and that the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works.—Decision of *Bacon*, C.J., reversed. *In re* Newman. *Ex parte* Capper - - **724**

17. —— *Proof—Loan of Money to Trader to be employed in his Business—Borrower to be Trustee for Lender—Subsequent Bankruptcy of Borrower.*] *B.*, a trader, in 1857 went through the ceremony of marriage with *M.*, a sister of his deceased wife, and thenceforth lived with her as his wife. In 1858 a sum of £2000, which came to her under the will of her father, was by her direction paid to *B.*, to be employed by him in his business, it being at the same time agreed that *B.* should be a trustee of the £2000 for *M.*, and that a settlement should be executed to carry out the agreement. In 1876 *B.* filed a liquidation petition. No settlement of the £2000 had been executed:—*Held*, that *M.* was not entitled

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to prove in the liquidation for the £2000 in competition with the creditors of the business. *In re* Beale. *Ex parte* Corbridge - - 246

18. —— *Protected Transaction — Building Contract—License to Employer to seize Materials on Default or Bankruptcy of Contractor—Seizure between Filing of Liquidation Petition and Appointment of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 23, 94, 95, 125.] A builder contracted with a building club to erect some houses for them on their own land. The contract contained a stipulation that if the contractor should neglect or refuse to proceed with the work in a proper manner to the satisfaction of the architect of the club, or become bankrupt, or insolvent, or otherwise rendered incapable of completing the contract, the architect should have power, after giving two days' notice in writing to the contractor, to appoint other persons to complete the work, and to provide the requisite materials, and also to seize and retain all materials, plant, and implements; provided that the contractor should have drawn money on account of his contract.—The contractor commenced the works and carried them on for some time, receiving a considerable sum from the club. On the 30th of May he filed a liquidation petition. On the 2nd of June the architect of the club gave notice to the contractor that, as he had neglected to proceed with the works, they should, on the expiration of two days, employ other means of completing the works, and that he must not remove any materials, implements, or plant from the works, and on the expiration of this notice the club took possession of the materials, implements, and plant:—*Held*, that the club were entitled, as against the trustee in the liquidation, to retain what they had seized, the seizure being a protected transaction within sect. 94 of the *Bankruptcy Act*, 1869. *In re* Waugh. *Ex parte* Dickin - - - - - 524

19. —— *Security given by Trustee—Enforcing Bond in Name of Chief Judge—Power of County Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 14, *sub-s.* 2—*Bankruptcy Forms*, 1870, *No.* 40.] A bond with sureties given by a trustee in a bankruptcy (according to Form No. 40 of the Bankruptcy Forms, 1870) to the Chief Judge, as security for the faithful discharge of the duties of his office, may be enforced by the order of a County Court. *In re* Parry - - 250

20. —— *Undischarged Debtor—Second Liquidation Petition—Discharge granted on Payment of Specified Sum to Trustee as the Purchase-money of the Estate—Money claimed by Trustee under First Liquidation — Rights of Trustee under Second Liquidation—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] An undischarged debtor went into business again, and afterwards filed a second liquidation petition. His creditors, old and new, empowered the trustee to sell the debtor's estate to him for £475, upon payment of which sum he was to be entitled to his discharge. The money was paid, and was then claimed by the trustee under the first liquidation. The Court decided in favour of that claim. The second trustee thereupon claimed the debtor's stock-in-trade and effects:—*Held* (reversing the decision of the

BANKRUPTCY—*continued.*
County Court Judge), that the debtor, having paid the £475, was free from the claims of all his creditors, and was entitled to retain whatever property he had acquired. *In re* Caughey. *Ex parte* Caughey - - - - 533

21. —— *Undischarged Debtor—Property acquired — Earnings of Personal Labour — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.] A liquidating debtor, who had carried on business as a painter, after he filed his petition, but before he had obtained any order of discharge, contracted to paint a yacht for the sum of £49. During the progress of the work he received £7 on account. The trustee claimed the balance of £42, and it was paid to him by the owner of the yacht. There was evidence that the £49 represented £15 for the debtor's personal labour, £15 for wages of workmen, £10 for cost of materials, and £9 for profit, and that the debtor borrowed money to pay the workmen and purchased the materials on credit. The County Court Judge ordered the trustee to pay the debtor £33 out of the £42:—*Held*, on appeal, that the trustee was entitled to retain the whole of the £42. *In re* Dowling. *Ex parte* Banks - - - - - 689

—— Drawer of bill of exchange—Proof - 795
See Bill of Exchange.

—— Partners — Proof by trustee against co-partner's estate - - - 537
See Partnership. 1.

—— Practice—Time for appealing - 794
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BANKRUPTCY RULES, 1870, r. 143 - 794
See Practice. 8.

—— **r. 166** - - - - - 13
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—— **rr. 208, 252–256, 259, 295** - - 519
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—— **Forms 107, 108, 112** - - - 519
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BENEFICIAL INTEREST—Gift to executors of deceased person - - - 53
See Will. 7.

BILL OF EXCHANGE—*Notice of Dishonour—Bankruptcy of Drawer—Appointment of Trustee—Proof.*] It is sufficient for the holder of a dishonoured bill of exchange to give notice of dishonour to the drawer himself, even though before the dishonour he has been adjudicated a bankrupt, and a trustee of his property has been appointed.—The holder of a bill of exchange which was dishonoured after the appointment of a trustee in the bankruptcy of the drawer sent notice of the dishonour to the drawer by post to an address which he had left for some months:—*Held*, that, that address being the only one with which the holder was acquainted, the notice was sufficient.—The holder was, therefore, allowed to prove in the bankruptcy in respect of the bill. *Ex parte* Baker. *In re* Bellman - - 795

BILL OF SALE—Agreement not to register 682
See BANKRUPTCY. 5.
—— Illegal consideration—Compounding felony
See BANKRUPTCY. 6. [150
—— Registration—Bankruptcy - 23, 503
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—— Two separate houses — Possession of one house - - - - 496
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See WILL. 5.
BOARD OF TRADE—Opening of railway - 735
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—— Warrant of—Abandonment of railway 315
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BONA FIDES—Voting of creditors—Resolution for composition - - - 293
See BANKRUPTCY. 8.
BOND—Deposit of—Foreclosure - - 605
See PLEDGE.
—— For completion of railway - - 315
See RAILWAY. 1.
—— Foreign—Gift of - - - 97
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—— Trustee in bankruptcy—Mode of enforcing
See BANKRUPTCY. 19. [250
BORROWING POWERS - - - 470
See COMPANY. 1.
BOUNDS—Coal mine—Breaking bounds - 845
See MINE. 1.

BROKER — *Stockbroker — Agency — Following Money.*] *C.*, a trustee, employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The broker sold the consols for cash, bought railway stock to the same amount for the settling-day, and received the price of the consols in a cheque, which he paid into his account at his bankers. He stopped payment before the settling-day, and went into liquidation. *C.* claimed so much of the broker's balance at his bankers as was attributable to the price of the consols. The Registrar disallowed the claim, holding that the relation between broker and customer was similar to that between banker and customer, and that *C.* was only a general creditor:—*Held*, on appeal, that as the price of the consols was known by the broker to be trust money, it could be followed, and that the claim must therefore be allowed:—*Held*, by *James*, L.J., and *Bramwell*, J.A., that, apart from the question of trust, the position of a broker is not that of a banker, but of an agent into whose hands money is put to be applied in a particular way, and that money paid to him can therefore be followed by the customer. *Ex parte* COOKE. *In re* STRACHAN - - - - 123

BUILDING CONTRACT—Bankruptcy—Penalty—Proof in bankruptcy - - 724
See BANKRUPTCY. 16.
—— Bankruptcy of contractor—Seizure of materials by employer - - 524
See BANKRUPTCY. 18.

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CASES—*Alexander* v. *Alexander* (2 Ves. Sen. 640) discussed - - - - 600
See POWER. 1.
—— *Bush's Case* (Law Rep. 9 Ch. 554) explained
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—— *Clarke* v. *Cookson* (2 Ch. D. 746) approved
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—— *Clarke* v. *Wright* (6 H. & N. 849) considered
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See BANKRUPTCY. 5.
—— *Garthwaite* v. *Robinson* (2 Sim. 43) disapproved of - - - - 61
See POWER. 2.
—— *Gowan* v. *Broughton* (Law Rep. 19 Eq. 77) dissented from - - - 53
See ADMINISTRATION. 3.
—— *Hewison* v. *Negus* (16 Beav. 594) followed
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—— *Hopkinson* v. *Rolt* (9 H L. C. 514) considered
See DOWER. [639
—— *Houldsworth* v. *Davenport* (3 Ch. D. 185) distinguished - - - 651
See MORTMAIN.
—— *Howes* v. *Young* (1 Ex. D. 146) considered
See BANKRUPTCY. 11. [521
—— *Humphrey* v. *Tayleur* (Amb. 136) discussed
See POWER. 1. [600
—— *Morris* v. *Debenham* (2 Ch. D. 540) approved
See VENDOR AND PURCHASER. 3. [802
—— *Rede* v. *Oakes* (4 D. J. & S. 505) considered
See VENDOR AND PURCHASER. 3. [802
—— *Roberts* v. *Roberts* (2 Ph. 534) considered
See PRACTICE. 1. [413
—— *Semenza* v. *Brinsley* (18 Q. B. (N.S.) 467) explained - - - - 133
See SET-OFF.
—— *Solomon* v. *Solomon* (3 L. J. (Ch.) 473) approved - - - - 665
See ADMINISTRATION. 5.
—— *Stevens, Ex parte* (Law Rep. 20 Eq. 786) distinguished - - - 682
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—— *Stewart* v. *Jones* (3 De G. & J. 532) questioned - - - - 620
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—— *Stolworthy* v. *Sancroft* (10 Jur. (N.S.) 762) considered - - - - 61
See POWER. 2.
—— *Teague, In re* (11 Beav. 318), disapproved
See SOLICITOR. 5. [835
—— *Teasdale's Case* (Law Rep. 9 Ch. 58), dictum questioned - - - - 327
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—— *Wolfe* v. *Findlay* (6 Hare, 66) disapproved of - - - - - 421
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CERTIFICATE—Issue of shares - - 140
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CHILDREN—Illegitimate - - - - 600
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—— Gift to—Mistake as to number - 41
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CO-DEFENDANTS—Claim against—How raised —Counter-claim - - - 586
See Practice. 17.

COMMON—Right of - - - - 667
See Right of Common.

COMPANY—*Borrowing Powers—Issue of Debentures at a Discount to a Director—Companies Act*, 1862, *s.* 165.] Directors, with borrowing powers, issued debentures at 7½ per cent. discount. Some of the debentures having been taken by a director:—*Held*, that the issue of debentures at a discount was not illegal; and that the director was not liable to the company for the difference between 92½ per cent. and par. *In re* Compagnie Générale de Bellegarde. Campbell's Case [470

2. —— *Contract for paid-up Shares—Creditors — Issue — Certificate — Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] There is no fraud on the part of a company towards a purchaser of shares in not registering a contract as to the issue of those shares as paid up.—The 25th section of the *Companies Act*, 1867, is in favour of creditors, and does not apply as between the company and the shareholders.—The issue of the certificate is not necessary to the issue of shares within that section.—*Bush's Case* (Law Rep. 9 Ch. 554) explained. *In re* Heaton's Steel and Iron Company. Blyth's Case - - 140

3. —— *Deposit in pursuance of Standing Orders—Application of Deposit—Insolvent Company—Winding-up.*] By an Act for a public undertaking it was provided that if within a certain time the undertaking should not be completed or half the capital paid up and expended on the work, the deposit made in pursuance of the Standing Orders of the Houses of Parliament should be forfeited to the Crown, or, in the discretion of the Court, if the company was insolvent and had been ordered to be wound up, should wholly or in part be applied as assets of the company for the benefit of the creditors. The company was ordered to be wound up on the ground of inability to pay its debts:—*Held*, by *Malins*, V.C., that the deposit ought to be applied in payment of debts and the costs of winding up in priority to any moneys to be received from future calls.—*Held*, on appeal, that the deposit

COMPANY—*continued.*

was to be resorted to so far only as was necessary for paying creditors, and that no order could be made for applying any part of it as assets of the company until it was ascertained in the winding-up that there were debts which could not be paid by means of calls on the shareholders. *In re* Bradford Tramways Company - - 18

4. —— *Directors' Liability — Agreement to take Shares.*] *R.*, the chairman of the board of directors of a company in which he held fifty shares, signed a letter of application for 450 more, striking out the reference to the payment of the deposit which was required on application for shares. There was some evidence to shew that this application was made in pursuance of a previous promise by *R.* to become a holder of 500 shares, and that on the faith of this promise he had been elected chairman.—No notice was taken of the application till after seven months, when at a board meeting it was proposed and seconded that 450 shares should be allotted to *R.* *R.*, who was present, handed in a letter withdrawing his application, and deposed that he had previously withdrawn it verbally. There was no proper evidence that the resolution to allot shares to *R.* had been carried, but a letter of allotment was sent him on the following day. The company was at this time in a hopeless state, and a resolution for winding it up was passed a fortnight afterwards:—*Held*, by *Malins*, V.C., that, although if *R.* had been an outside applicant the delay and the informality of the allotment would have exempted him from liability as to the 450 shares, he could not avail himself of the delay and informality which he, as chairman of the board of directors, was bound to have prevented, and that he was a contributory in respect of those shares.—*Held*, on appeal, that the offer by *R.* to take shares was not shewn to have been accepted by the company before it was withdrawn by him, and that he was not liable in respect of the 450 shares. *In re* Universal Non-Tariff Fire Insurance Company. Ritso's Case - - - - 774

5. —— *Directors' Liability—Qualification of Directors — Misfeasance — Companies Act*, 1862, *s.* 165.] The articles of association of a company provided that the qualification for the office of director should be the actual holding of twenty-five share warrants, each representing a single fully paid-up share in the company.—Each director was qualified by having twenty-five share warrants deposited by one of the promoters with the bankers of the company to the account, and at the order, of the director:—*Held*, upon liquidation, that a director was liable, under the 165th section of the *Companies Act*, 1862, to pay to the liquidator a sum equal to the nominal value of twenty-five shares. *In re* Caerphilly Colliery Company. Pearson's Case - - - 222

6. —— *Directors' Liability—Their Duty as Trustees—Fraud—Constructive Notice.*] The promoters of a company, who were also directors, purchased land and sold it to the company at an increased price, retaining the difference for themselves. Part of the purchase-money was paid in debenture bonds. After the company had gone into liquidation, *L.*, a director, but not one of the promoters, purchased 100 of the debentures at

COMPANY—*continued.*

25 per cent., for which he claimed to prove :—*Held*, by *Malins*, V.C., that *L.*, as a director, could not plead ignorance of the purchase by which the shareholders were defrauded; that, having been in the position of a trustee for the shareholders, he could not, by the purchase of debentures after the insolvency, make a profit out of a transaction which, as such trustee, he ought to have prevented, and that the claim must be disallowed.—On the claim being heard by the Court of Appeal the matter was compromised on the terms of the official liquidator paying to *L.* the amount which he actually paid for the debentures, with interest from the date of purchase. *In re* Imperial Land Company of Marseilles. *Ex parte* Larking [566

7. —— *Guarantee Fund to secure Payment of Dividends—Agreement that Fund be "considered as" Profits—Liquidation—Rights of Creditors——Companies Act*, 1862, *s.* 38 (7).] By an agreement for the sale of mining property to a trustee for a company in formation, it was agreed that the sum expressed to be the purchase-money should be paid by instalments, and that so much of the last two instalments as was necessary to guarantee dividends at the rate of £7 per cent. on all the shares of the company issued to the public for four years should be invested in consols; the vendor guaranteed payment of the dividend; and it was provided that after each of eight half-yearly meetings, one-eighth of the fund should be sold out and paid to the directors. This guarantee was announced in a prospectus; and the agreement was referred to in the articles of association of the company, which was registered shortly afterwards. Of these articles, one provided that payments made to the directors out of the guarantee fund should be "considered as profits and applicable only to the payment of dividends."—Several sums having been paid to the trustees of the guarantee fund, and by them invested, and several sales and payments out having also been made by them, the company, before the expiration of the four years, went into voluntary liquidation, whereupon the trustees transferred and paid the funds in their hands into Court.—Upon petition under the *Trustee Relief Act*, by shareholders, claiming the funds as their private property in opposition to creditors :—*Held*, that the funds did not belong to the shareholders individually; and order made that they be transferred and paid to the liquidator. *In re* Stuart's Trusts - - - - - - 213

8. —— *Misrepresentation by Directors and Secretary—Issue of Preference Stock under a False Description—Mutual Mistake of Law.*] The *L. Railway Company* had power under its Acts to issue £100,000 preference shares and a large amount of ordinary shares. By an Act passed in 1864, it was amalgamated, together with other companies, with the *C. Company*, at which time it had issued £85,000 preference shares, which were to rank as No. 1 Preference Stock, and £60,000 ordinary shares, which were to rank as No. 2 Preference Stock, and power was reserved by the Act to the *C. Company* to raise any capital which any of the amalgamated companies had power to raise before the amalgamation. The directors, under a

COMPANY—*continued.*

bonâ fide belief that they had power to raise the remaining £15,000 preference shares of the *L. Company*, and to make them rank with the £85,000 No. 1 Preference Stock, issued £15,000 preference stock, and described them in the certificates, which were signed by the directors and the secretary, as "No. 1 Preference Stock," and some of this stock was purchased by the Plaintiffs.—A scheme was filed in Chancery for arranging the affairs of the *C. Company*, and it was decided by the Court that the new stock was not No. 1 Preference Stock, but ranked below both it and No. 2 Preference Stock.—On a bill being filed by the Plaintiffs, alleging that they had been deceived by the form in which the stock had been issued and the certificates made, and praying that the company, the directors, and secretary might be held responsible for the misrepresentation :—*Held*, by the Master of the Rolls, that the company, and also the directors and secretary, were liable to make good the misrepresentation to the Plaintiffs, and either to issue No. 1 Preference Stock to them or re-pay them their purchase-money.—But the Court of Appeal, being of opinion, on the result of the evidence, that the Plaintiffs did not suppose they were purchasing part of the £85,000 No. 1 Preference Stock, but a new stock which ranked with the No. 1 Preference Stock, *held* that the Plaintiffs had not been deceived by any misrepresentation of fact, but that there had been a common misconception of law, and they accordingly reversed the decree of the Master of the Rolls, and dismissed the bill with costs. Eaglesfield *v.* Marquis of Londonderry [693

9. —— *Reduction of Capital and Shares—Loss of Part of Paid-up Capital—Writing off Loss—Petition—Jurisdiction—Companies Act*, 1867 (30 *&* 31 *Vict. c.* 131), *ss.* 9-16.] The nominal capital of a limited company was divided into shares of £32 each, all of which were subscribed for. On all the shares (except a few which were paid up in full) £29 per share was paid, leaving £3 per share to be called up. The capital having been partially lost through the depreciation of the property which represented it, the company desired to write off the loss, and for that purpose proceeded to take steps under the *Companies Act*, 1867, for reducing their nominal capital. They accordingly passed a resolution that the nominal capital should be reduced to a specified amount, and that each £32 share should be reduced to £23 by the extinction of £9 per share, to the intent that the existing liability of £3 per share on all the shares, except those fully paid up, should be preserved. They then presented a petition for an order for confirming the resolution, the minute required by sect. 15 of the Act stating that the amount of the reduced capital was divided into shares of £23 each (instead of the original £32), on all of which (except the fully paid-up shares) the sum of £20 and no more was to be deemed to have been paid up :—*Held*, upon an application by the company by summons, for liberty to proceed with the petition.—That the Court had no jurisdiction to sanction the proposed reduction of capital, inasmuch as the Act contained no provision for enabling a company whose

COMPANY—*continued.*

paid-up share capital had been partially lost, as in the present instance, to write off that loss by reducing the nominal amount of each share. *In re* Ebbw Vale Steel, Iron, and Coal Company [827

10. —— *Ultrà vires Act—Power to Directors to buy up Shares—Trafficking in Shares—Reduction of Capital—Clause of Forfeiture of Shares of Shareholder taking Legal Proceedings against Company.*] A company having 150,000 shares issued and half paid-up, passed a special resolution that the directors should have power to apply the company's assets in purchasing from any shareholders willing to sell, any number of shares not exceeding 100,000; and that such shares should not be re-issued by the directors without the authority of a general meeting. The company had no power under its memorandum of association or articles to purchase or deal in its own shares or accept surrenders:—*Held* (affirming the decision of *Bacon*, V.C.), that the scheme was *ultrà vires* and invalid, being either an attempt to reduce the capital of the company without complying with the provisions of the *Companies Act*, 1867, ss. 9–13, or else a trafficking in the shares of the company which was not authorized by the memorandum of association.—*Dictum* in *Teasdale's Case* (Law Rep. 9 Ch. 58) questioned.—A clause in the articles of association provided that the shares of any shareholder who directly or indirectly commenced or threatened any action, suit, or other proceeding against the company or the directors should be forfeited on payment to him of the full market value:—*Held*, that the clause was invalid. Hope *v.* International Financial Society - - 327

11. —— *Winding-up — Petition — Defunct Company—Companies Act*, 1862, *s.* 79.] A petition to wind up a company, which proved abortive, had never carried on business, never issued any shares, and owed no debts, by the administrator of one of the subscribers of the memorandum of association who was alleged, but not proved, to be a creditor of the company, was dismissed with costs. *In re* New Gas Generator Company - - - - - - 874

12. —— *Winding-up — Proof — Interest on Judgment Debt—Interest on Debenture—*1 *&* 2 *Vict. c.* 110, *s.* 17.] A railway company, in the year 1864, issued debentures by which they bound themselves to pay a principal sum one year after the date of issue, with interest at 6 per cent., and charged the railway and undertaking with the payment of the principal sum and interest.—Soon after the expiration of the year a debenture holder brought an action against the company, and recovered judgment for the principal debt, interest, and costs. The company was ordered to be wound up in 1868, and the debenture holder was admitted to prove for the judgment debt and interest at 4 per cent. The debenture holder claimed to prove for an additional 2 per cent. on the original amount of the debenture from the date of the judgment:—*Held* (affirming the decision of *Bacon*, V.C.), that the original debt was merged in the judgment, and that the claimant was only entitled to interest on the judgment at 4 per cent. *In re* European Central Railway

COMPANY—*continued.*

Company. *Ex parte* Oriental Financial Corporation - - - - - 33

13. —— *Winding-up — Proof — Interest on Judgment Debt.*] *H.* brought an action against a company for £3000 on a promissory note with interest at 6 per cent. Afterwards, an agreement was made that the company should give *H.* judgment for £3500, and that the loan of £3000 should continue for two years, and that the judgment should stand as collateral security for it. The company was wound up:—*Held*, that *H.* was entitled to £3000 with interest at 6 per cent. *In re* Agriculturist Cattle Insurance Company. *Ex parte* Hughes - - - - 34, n.

—— Winding-up—Rent in arrear—Distress 625
See Landlord and Tenant.

COMPOSITION WITH CREDITORS—Payment of money in hands of solicitor - 515
See Bankruptcy. 7.

—— Registration of resolution - - 293
See Bankruptcy. 8.

COMPOUNDING FELONY—Consideration for bill of sale - - - - 150
See Bankruptcy. 6.

COMPULSORY POWERS—*Local Act—Corporation—Limiting Time for Compulsory Powers—Notice to treat—"Prolongation" by second Act of Powers expired under former Act—Construction of Acts, Principles of—Injunction.*] A special Act, passed in 1863, empowered a local board to construct waterworks and establish markets, and, with the consent of the ratepayers first obtained, to purchase compulsorily certain lands, including lands belonging to the Plaintiff, for those purposes: provided that the compulsory powers should not be exercised after the expiration of seven years from the passing of the Act. The seven years expired in July, 1870, the ratepayers having shortly before authorized the board to purchase the Plaintiff's property for the purpose of a market. In August, 1870, the board obtained a second Act "to extend the time for the compulsory purchase of land and completion of the waterworks, and to authorize them to construct gasworks, and for other purposes." After reciting that "the time limited by the Act of 1863 had expired, and that it was expedient that such time, and also the time limited by the former Act for the construction of waterworks, should be extended," it was enacted (sect. 5) that "the time limited by the Act of 1863 for the compulsory purchase of lands should be prolonged and extended to the period of three years from the passing of this Act." The Act contained no express reference to markets, but provisions relating only to the construction of waterworks and gasworks.—In December, 1870, the board served the Plaintiff with notice to treat in respect of his property, and ultimately, in July, 1876,—the parties having failed to agree,—with notice of their intention to summon a jury to assess compensation, whereupon the Plaintiff moved for an injunction to restrain the board from proceeding before a jury and taking his property otherwise than by agreement, on the ground, 1, that the time for the exercise of their compulsory powers under the first Act having expired, could not be "prolonged and extended" by

COMPULSORY POWERS—*continued.*

the second Act; 2, that whatever compulsory powers were vested in the board by the second Act related only to lands required for the express purposes of that Act, namely, the construction of waterworks and gasworks; and, 3, that, at all events, these were new powers, and, if applicable to lands required for markets, could only be exercised with a new consent on the part of the ratepayers first obtained.—Motion refused with costs. —Principles of construction of Acts of Parliament considered. BENTLEY *v.* ROTHERHAM AND KIMBERWORTH LOCAL BOARD OF HEALTH - 588

—— Public Health Acts - - - 395
See SEWER.

CONDITIONS OF SALE—Form of conveyance 226
See VENDOR AND PURCHASER. 1.

CONSIDERATION—Assignment of all debtor's property—Existing debt - 509, 682
See BANKRUPTCY. 2, 5.

—— Illegality—Bill of sale - - 150
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—— Marriage—Statute of Frauds - - 73
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—— Marriage settlement—Son of former marriage - - - - 483
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See PRACTICE. 13, 14.

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CONSTRUCTIVE NOTICE—Fraud of directors 566
See COMPANY. 6.

CONTEMPT OF COURT—Breach of injunction 98
See PRACTICE. 15.

—— Forcible removal of goods - - 509
See BANKRUPTCY. 2.

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See PRACTICE. 25.

CONTINGENT INTEREST—Right of action—Administration - - - 413
See PRACTICE. 1.

CONTRACT—Incorporation of plan with - 1
See FRAUDS, STATUTE OF. 2.

—— Paid-up shares—Companies Act, 1867, s. 25
See COMPANY. 2. [140

—— Sale of goods—Rescission - - 108
See SALE OF GOODS.

CONVEYANCE—Form of—Conditions of sale 226
See VENDOR AND PURCHASER. 1.

COPYHOLDERS—Right of common - 667
See RIGHT OF COMMON.

COPYRIGHT—*Assignment—Parol—5 & 6 Vict. c. 45.*] An assignment of a copyright under 5 & 6 Vict. c. 45, must be in writing.—Accordingly, when the author of a song agreed verbally with *S.* to part with his copyright, and subsequently by instrument in writing assigned it to *L.*, who entered the song at *Stationers' Hall*:—*Held*, that the title of *L.* must prevail, and that he could

COPYRIGHT—*continued.*

sustain an action to restrain *S.* from infringing his copyright. LEYLAND *v.* STEWART - 419

2. —— *Periodical—Infringement—Separate Publication of Serial—5 & 6 Vict. c. 45, ss. 18, 19, 24.*] A periodical or magazine is a book within the meaning of sect. 24 of 5 & 6 Vict. c. 45, and its proprietor, if he has, pursuant to sect. 19, registered the first number at *Stationers' Hall*, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under sect. 18, although neither the serial nor the first number containing it has been separately registered. HENDERSON *v.* MAXWELL - - - - - 163

CORPORATION—Borough—Power of making sewers - - - - 395
See SEWER.

—— Compulsory powers—Limits of time - 588
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—— Compensation under Lands Clauses Act—Payment out of Court - - 207
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—— Lien for—Solicitor - - - 835
See SOLICITOR. 5.

—— Lunacy—Costs of inquiry—Party not found lunatic - - - - 301
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—— Printing evidence - - - 24
See PRACTICE. 4.

—— Security for - - - - 784
See PRACTICE. 24.

COUNTER-CLAIM - - 432, 476, 586
See PRACTICE. 16, 17, 18.

COVENANT—*Not to carry on Trade—Liquidated Damages or Penalty—Injunction.*] A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from *C.* under a penalty of £100, to be paid by way of liquidated damages for every such offence, is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in *C.*; and the breach will be restrained by injunction. JONES *v.* HEAVENS - - 636

2. —— *Running with the Land—Easement—Disposition by Owner of Two Tenements.*] The owner of an estate granted a lease of a plot of ground to *A.*, who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the

COVENANT—*continued.*
lessor or his tenants, or diminish the value of the adjoining property, nor build, nor allow to be built on, the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to *B.*, who entered into a similar restrictive covenant. Within twenty years *A.* commenced, with the approval of the lessor, to build upon his ground so as to darken the windows of *B.'s* house:—On bill by *B.* to restrain *A.* from erecting and the lessor from approving the building objected to:—*Held*, that *B.* was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in *A.'s* lease enured for *B.'s* benefit.
MASTER *v.* HANSARD - - - - 718

CREDITOR—Bankruptcy—Examination - 13
See BANKRUPTCY. 10.
—— Majority of creditors - - - 293
See BANKRUPTCY. 8.
—— Not claiming in administration suit 757
See ADMINISTRATION. 4.

CUSTODY OF INFANT - - - 157
See INFANT. 1.

DAMAGES—Liquidated—Not to carry on trade
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—— Liquidated—Proof in bankruptcy - 724
See BANKRUPTCY. 16.

DEATH—Before testator—Gift to a class - 620
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—— Presumption of—Mortgagor - - 144
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—— Without issue - - - - 182
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—— Issue at a discount - - - 470
See COMPANY. 1.

DEBT—In course of trade—Bankruptcy - 685
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DEBTOR—Undischarged - - 533, 689
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DECLARATION OF TRUST—Parol—Solicitor and client - - - - 49
See ESTOPPEL.

DEED—*Misdescription of Property—Latent Ambiguity—Falsa Demonstratio—Parol Evidence—Statute of Frauds.*] By an instrument under seal dated the 2nd of November, a customer gave to his bankers a charge on the premises mentioned in the schedule as a security for all moneys then due or thereafter to become due from him to them, subject to a prior mortgage of the 3rd of October to a building society, and he covenanted to execute a legal mortgage when required. The schedule described the property as "three leasehold houses in *Coity* held by the mortgagor under a lease of the 25th of September." The lease of the 25th of September in fact comprised only one house. There was evidence that on the 2nd of November the bankers agreed to make further advances to

DEED—*continued.*
the customer, upon his giving them satisfactory security; that he then offered to give them a charge upon three leasehold houses, which he pointed out to the manager; that the manager agreed to accept those three houses as security; and that the deed of charge was then drawn up at the bank, the description in the schedule being inserted from the customer's instructions. One only of the three houses thus pointed out was comprised in the lease of the 25th of September, and the two others were comprised in a lease of the 31st of December, which, as well as the lease of the 25th of September, was subject to a prior mortgage to the building society:—*Held*, that this evidence was admissible, and that the bankers were entitled to a charge on the two houses comprised in the lease of the 31st of December. *In re* BOULTER. *Ex parte* NATIONAL PROVINCIAL BANK OF ENGLAND [241
—— Lien on—Solicitor - - - 129
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—— Voidable—Infancy - - - 428
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—— By company—Winding-up - - 315
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—— Policy of insurance—Payment of, to creditor
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—— Liability of - - - 566, 774
See COMPANY. 4, 6.
—— Misrepresentation by - - - 693
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—— Qualification of - - - - 222
See COMPANY. 5.

DISCOVERY—Action for—Trade-mark—Shipowners carrying goods - - 92
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—— Staying proceedings—Debtor—Summons—Security - - - - 105
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See PRACTICE. 12, 24. [784

DISTRESS—Rent due before winding-up order
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DISTRIBUTION—Period of—Surviving - 210
See WILL. 12.

DOCUMENTS—Production of - - 661
See PRACTICE. 21.

—— Solicitor's lien - - - - 835
See SOLICITOR. 5.

DOWER—*Marriage before the Dower Act* (3 & 4 *Will.* 4, c. 105)—*Mortgage of Husband's Freeholds, the Wife joining and acknowledging in order to release her Dower—Right of Widow to redeem—Principal and Surety.*] A wife, married before the *Dower Act*, who joined her husband in conveying, by deed acknowledged, his freeholds to a mortgagee free from dower, with a proviso for redemption in favour of the husband, and a power of sale directing the surplus to be paid to the husband; —*Held* to be entitled, when a widow, to redeem her dower.—In the above circumstances, the widow, having been a surety for the husband, is entitled, upon payment or satisfaction of the first mortgage debt, to hold the property comprised in the first mortgage as a security for her dower against the subsequent incumbrancer.—Husband and wife, having been married before the *Dower Act*, joined in a deed, acknowledged by the wife, in mortgaging the husband's freeholds, free of dower, to secure a debt of the husband. The reconveyance on redemption and the surplus proceeds of sale were reserved to the husband alone. Afterwards, by deed executed by the husband alone, the lands were purported to be conveyed, subject to the first mortgage, free of dower, to a second mortgagee. Then by deed, to which the first and second mortgagees only were parties, the second mortgagee took a transfer to himself of the first mortgage debt and securities; and afterwards sold the property:—*Held*, that the widow was entitled to dower out of the surplus proceeds of sale after payment of the expenses of sale, and of the first mortgage debt, interest, and costs.—*Williams* v. *Owen* (13 Sim. 597) held irreconcilable with *Hopkinson* v. *Rolt* (9 H. L. C. 514). DAWSON *v.* BANK OF WHITEHAVEN - - 639

EARNINGS — Personal labour — Undischarged debtor - - - - 689
See BANKRUPTCY. 21.

EASEMENT—Covenant by owner of two tenements - - - - 718
See COVENANT. 2.

—— Sale subject to—Form of conveyance 226
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EJUSDEM GENERIS—Articles specifically enumerated - - - 435, 800
See WILL. 4, 5.

ELDEST SON—Shifting use - - - 251
See WILL. 15.

EQUITABLE—Mortgage—Deposit of bonds 605
See PLEDGE.

ESTOPPEL—*Solicitor—Moneys entrusted to Solicitor for Investment—Parol Declaration of Trust —Letters and Conversations.*] *W.*, having entrusted *P.*, his solicitor, with a sum of £7700 for investment on mortgage on his behalf, was informed by *P.'s* clerk, in conversation, that "*P.* proposed to invest the money on mortgage of leasehold property at *Camden Town* at 5 per cent.," and subsequently received a letter from *P.* stating that "the money was put on 5 per cent. mortgage as arranged by my clerk with you." On *P.'s* death it was found that no mortgage existed in favour of *W.*, but that *P.* had advanced £100,000 to a firm of builders on a mortgage of their leasehold property at *Camden Town*:—*Held*, that *P.* and those claiming under him were bound by the representation made by him, and were estopped from denying that the £7700 formed part of the £100,000 so invested. MIDDLETON *v.* POLLOCK. *Ex parte* WETHERALL - - - 49

EVIDENCE—Appeal—Adding fresh evidence 24
See PRACTICE. 4.

—— Death—Presumption of time of - 144
See LIMITATIONS, STATUTE OF.

—— Parol—Latent ambiguity - - 241
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—— Partition suit - - - - 498
See PARTITION.

EX PARTE APPLICATION—Extension of time for appeal - - - - 139
See PRACTICE. 7.

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See POWER. 2.

EXECUTION—Sum exceeding £50—Act of bankruptcy - - - - 521
See BANKRUPTCY. 11.

EXECUTOR—Carrying on business of testator—Implied trust for creditors - 509
See BANKRUPTCY. 2.

—— Gift to, in that character - - 841
See WILL. 6.

—— Gift to executors of deceased person - 53
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—— Liability of — Partial distribution before suit - - - - - 389
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FACTOR—Debt due personally—Set-off - 133
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FALSA DEMONSTRATIO—Deed - - 241
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FATHER—Custody of infant—Misconduct—Desertion - - - - 157
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FELONY—Compounding—Consideration for bill of sale - - - - - 150
See BANKRUPTCY. 6.

FICTITIOUS INTEREST—Special case - 189
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FIDUCIARY RELATION — Collusion between vendor's agent and purchaser - 352
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—— Director of company - - - 566
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—— Mortgagee in possession—Order of Court
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FIXTURES—Bill of sale—Registration—Bankruptcy - - - - 503
See BANKRUPTCY. 4.

FORCIBLE REMOVAL OF GOODS—Contempt of Court - - - - 509
See BANKRUPTCY. 2.

FORECLOSURE—Pledge of chattels - 605
See PLEDGE.

FOREIGN BONDS—Bequest of—Colonial bonds
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FOREIGN INVENTION—English patent - 9
See PATENT. 4.

FORFEITURE—Claim of, on shareholder taking legal proceedings against company 327
See COMPANY. 10.

FRAUD—Director of company - - 566
See COMPANY. 6.

—— Misrepresentation by directors - 693
See COMPANY. 8.

FRAUDS, STATUTE OF—*Specific Performance—Parol Agreement—Part Performance—Possession—Marriage—Consideration.*] A father verbally promised, in contemplation of the marriage of his daughter, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold, and was subject to a charge in favour of a building society, payable by instalments. The father paid those which fell due during his lifetime, and at his death there remained a balance of £110, which fell due shortly afterwards:—*Held*, that, the verbal promise to give the house having been established, the possession was a part performance which took the case out of the *Statute of Frauds*, that the contract was to give the house free from incumbrances, and that the £110 was payable out of the father's estate. UNGLEY *v.* UNGLEY - - - 73

2. —— *Vendor and Purchaser — Connected Writings—Plan.*] The *N.* Commissioners agreed to sell a property to the Defendant *D.* The contract did not refer to any plan, but the agents who signed it for the parties signed at the same time the following memorandum written upon a plan of the property:—"Plan of property sold to and purchased by *D.* 23rd Oct., 1874. N.B.—The property included in the purchase is edged with red colour":—*Held*, that the plan was sufficiently incorporated, and that the description in the contract was controlled by it. NENE VALLEY DRAINAGE COMMISSIONERS *v.* DUNKLEY - 1

FRAUDULENT—Preference - - - 555
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GENERAL GIFT—Articles *ejusdem generis*
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GENERAL WORDS—Rights of common - 667
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GIFT TO A CLASS - - 165, 620
See WILL. 1, 2.

GIFT TO CHILDREN—Mistake as to number of children - - - - 41
See WILL. 10.

GRANT OF PATENT—Date of—Date of sealing 9
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GUARANTEE FUND—Company—Payment of dividends - - - - 213
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HEARING IN CAMERÂ—Jurisdiction - 173
See PRACTICE. 19.

HEIR AT LAW—Representation of—Order XVI., rule 9 (a) - - - - 230
See PRACTICE. 23.

HUSBAND AND WIFE—*Ante-nuptial Agreement by Husband to settle Wife's Real Estate—Reversionary Interest—Liability of Wife.*] By an ante-nuptial agreement, signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the wife, and the husband agreed that "he would settle" his wife's reversionary share of the said real estate upon the usual trusts for the husband and wife, and their children. The wife's father having survived her mother, released the power and granted the estate after his death, giving his said daughter a share. The wife predeceased the husband and left two children. The property being still reversionary, an action was brought by the husband and one of the children against the other child, the wife's heir-at-law, for specific performance of the agreement:—*Held*, that the agreement bound the wife as having assented to her father's stipulation, and also her heir-at-law, and specific performance ordered accordingly. LEE *v.* LEE - - - 175

2. —— *Legacy to Separate Use of Wife—Country Draft on London Bankers—Indorsement to Husband—Payment to Husband's Deposit Account—Death of Husband—Claim by Widow against Executors.*] *M. G.*, to whom a legacy had been bequeathed to her separate use, received an uncrossed country banker's draft, payable in *London*, for the amount, less the duty, and she indorsed the draft and handed it over to her husband, and his bankers received the amount and placed it by his direction to his deposit account. The husband died suddenly a few days after. There was evidence pointing to the fact that the wife did not intend to give the cheque to her husband. In an action against his executors:—*Held*, that the widow was entitled to be paid the sum claimed. GREEN *v.* CARLILL - 882

—— Dower - - - - - 639
See DOWER.

—— Separate use—Marital rights of second husband - - - - - 233
See WILL. 16.

—— Settlement on second marriage - 483
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—— Settlement—Post-nuptial - - 85
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ILLEGITIMATE CHILDREN—Appointment to
See POWER. 1. [600

IMPLIED TRUST—Executor carrying on testator's business - - - - 509
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IMPLIED TRUST—*continued.*
—— Money in hand of solicitor—Composition *See* Bankruptcy. 7. [515
IMPROVEMENT COMMISSIONERS—Mortgage—Mortmain - - - - 651 *See* Mortmain.
INCORPORATION WITH CONTRACT—Plan 1 *See* Frauds, Statute of. 2.
INDORSEMENT—Cheque—Wife's separate estate *See* Husband and Wife. 2. [882
INFANT—*Custody of—Mother—Misconduct of Father—Desertion—Custody*—36 & 37 *Vict. c.* 12—*Talfourd's Act.*] A husband having abandoned his wife and kidnapped the only child of the marriage, a boy three years of age, and being co-respondent in a pending divorce action charging him with adultery,—The Court, upon the wife's petition under the *Infants Custody Act*, 1873 (36 & 37 Vict. c. 12), ordered immediate delivery of the child to her, with liberty of access by the father and paternal grand-parents, and also liberty to apply as to the maintenance and education of the child on his attaining seven years of age.—The principles which guide the Court in cases under Act, considered. *In re* Taylor, an Infant 157
2. —— *Voidable Deed—Assignment to secure Money advanced for Necessaries.*] A deed by an infant to secure the repayment of money advanced for necessaries is voidable.—Where the Plaintiff had advanced money to an infant partly in order to pay for necessaries, and he had by deed assigned to the Plaintiff his reversionary interest as a security,—in an action brought against the infant on his attaining twenty-one, for an account of moneys advanced to him and expended on necessaries, and for repayment, and also claiming that the same might be declared to be a charge on his reversionary interest:—*Held*, that, though the Plaintiff was entitled to an account and an order for repayment, the deed was not binding on the infant, and the security could not be enforced. Martin *v.* Gale - - - - 428
—— Partition action—Form of judgment - 494 *See* Partition.
INFRINGEMENT—Copyright - 163, 419 *See* Copyright. 1, 2.
—— Patent - - - - - 286 *See* Patent. 1.
INJUNCTION—Breach of—Notice by telegram 98 *See* Practice. 15.
—— Covenant by owner of adjoining tenements *See* Covenant. 2. [718
—— Covenant not to carry on trade - 636 *See* Covenant. 1.
—— Patent - - - - - 286 *See* Patent. 1.
—— Right of common - - - 667 *See* Right of Common.
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INSUFFICIENCY—Specification of patent 607 *See* Patent. 2.
INSURANCE—*Life—Deposit of Policy to secure Debt—Equitable Assignment—Death of Assured—Notice to Office of Creditor's Claim—Absence of Legal Personal Representative of Assured—Payment to Creditor—Interest—Policies of Assurance Act*, 1867 (30 & 31 *Vict. c.* 144)—*Chancery Amendment Act*, 1852 (15 & 16 *Vict. c.* 86), *s.* 44.] *S.* having effected two policies on his life for the purpose, as he expressly informed the assurance company, of enabling him to give *C.* a security for a debt which exceeded the amount of the policies, deposited them with *C.*, at the same time asking him by letter to instruct his, *C.'s*, solicitor "to prepare the necessary assignment." *C.*, however, never took any assignment. *S.* died insolvent, having made a will appointing executors, but no representation was taken out to his estate. *C.* then gave the company notice in writing of the death, and that he held the policies as security for his debt, and the company acknowledged the receipt of the notice in the terms of the *Policies of Assurance Act*, 1867, s. 6. Proper evidence of *S.'s* death having been subsequently produced to the company, they wrote to *C.* that the claim under the policies would be paid at the expiration of three months, but that the assent of *S.'s* legal personal representative would be required before settlement.—After the expiration of the three months *C.*, being unable to obtain payment of the policy moneys (although his debt was admitted by *S.'s* executors, and he offered the company an indemnity), brought an action for that purpose against the company, insisting that *S.'s* deposit and letter constituted an equitable assignment of the policies within the *Policies of Assurance Act*, 1867, and therefore enabled him to give a valid discharge for the moneys:—*Held*, that there had been no equitable assignment of the policies within the Act, and that the company were justified in refusing to pay him in the absence of *S.'s* legal personal representative:—*Ordered*, payment of the policy moneys to the Plaintiff after deducting the company's costs, the legal personal representative being dispensed with under the power given to the Court by sect. 44 of the *Chancery Amendment Act*, 1852 (15 & 16 Vict. c. 86): also payment by the company of interest at 4 per cent. from the day which had been fixed by them for the payment of the principal.—*Wolfe* v. *Findlay* (6 Hare, 66) disapproved of. Crossley *v.* City of Glasgow Life Assurance Company [421
INTEREST—Judgment debt—Proof in winding-up - - - - - 33 *See* Company. 12.
—— Judgment debt—Proof in winding-up 34, n. *See* Company. 13.
—— Loan to partnership - - - 789 *See* Partnership. 2.
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LANDLORD AND TENANT—*Winding-up—Right of Distress—Rent due at Date of Winding-up Order—Secured Creditors—Judicature Act*, 1875, *s.* 10.] The 10th section of the *Judicature Act*, 1875, does not so far assimilate the rules in the winding-up of companies to the Rules in Bankruptcy as to give the landlord of property of which a company in liquidation are tenants a right to distrain for rent due before the winding-up order. *In re* Coal Consumers Association - - - 625

LANDS CLAUSES ACT—*Railway Company—Money paid into Court—Costs of two Petitions for Payment out.*] Two petitions were presented by the same Petitioners for payment out of Court of money paid in by a railway company. The Petitioners were entitled to part of the money under a will, and to the other part under a settlement. The trustees of the will were made parties to one petition, and the trustees of the settlement to the second petition, and both sets of trustees appeared by separate solicitors and counsel:—*Held*, that the statements in the two petitions should have been included in one, and the company were ordered to pay the costs of the first petition and five guineas only towards the Petitioner's costs of the second petition, and three guineas for the costs of each set of trustees. *In re* Pattison's Devised Estates. *In re* Pattison's Settled Estates - - - - 207

LAPSE—Gift to a class - - - 165
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LAPSED SHARE—Costs of administration—Residue - - - - - 53
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LIFE ESTATE — Mortgage of — Presumption of death of mortgagor - - - 144
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LIMITATIONS, STATUTE OF (3 & 4 *Will.* 4, *c.* 27), *s.* 42—*Mortgagee of Life Estate in Possession—Death of Mortgagor Tenant for Life—Presumption of Time of Death—Account of Rents and Profits.*] In 1859 a suit for administration was instituted by the tenant for life under a will of certain leaseholds, who subsequently mortgaged her life interest. The mortgagee obtained, under an order made in 1860, liberty to enter, and did enter, into possession of the rents for the purpose of keeping down the interest on her mortgage, and paying the balance to the tenant for life. In March, 1866, the tenant for life left her home, and was never heard of afterwards. On a petition presented in 1875 by the persons entitled in remainder, it was held that, under the circumstances, the tenant for life must be taken to have died soon after June, 1866.—On a petition now presented by the same parties for an account of arrears of rent received by the mortgagee:—*Held* (varying the order of *Hall*, V.C.), that the Petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, and that they were, therefore, entitled to an account of rents; but that there was no fiduciary relation between the mortgagee and the Petitioners, and, therefore, they were only entitled to arrears for six years before the filing of the petition.—*Hicks* v. *Sallitt* (3 D. M. & G. 782) commented on. Hickman *v.* Upsall 144

—— Discovery of wrongful act - - 845
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—— Protected transaction - - - 524
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—— Registration of bill of sale - - 23
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—— Second petition—Old and new creditors 533
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LORD OF MANOR—Right to sell marl - 667
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LUNACY—*Costs where Party is found not Lunatic.*] A petition was presented for an inquiry as to the state of mind of Miss *S.* The medical visitor, by direction of the Court, saw her, and he made a report shewing that the case was one for inquiry. She was, however, when the inquiry took place, found by a jury to be of sound mind.—The Court was satisfied, on the evidence before it, that the Petitioner had not presented the petition of his own accord, but that the proceedings originated with the Petitioner's solicitor, who induced the Petitioner to lend his name, and after the inquiry gave him an undertaking to indemnify him against costs:—*Held*, that no costs ought to be given to the Petitioner, but that as the case was one calling for inquiry he ought not to be ordered to pay costs. *In re* E. S—— (a supposed Lunatic) 301

—— Lunatic trustee—Trustee Act—Vesting order - - - - - 325
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METROPOLITAN BUILDING ACT, 1855 (18 & 19 *Vict. c.* 122—*Appointment of Umpire—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125).] Where surveyors had been nominated under the *Metropolitan Building Act*, 1855, to settle differences in dispute between a building owner and an adjoining owner as to the erection of a party-wall, and such surveyors had refused to appoint an umpire, the Court appointed an umpire, under the *Common Law Procedure Act*, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party-wall. *In re* Metropolitan Building Act. *Ex parte* McBryde - - - 200

MINE—*Coal Mines—Breaking Bounds—Damage to adjoining Mine—Railway Company—Ultrà Vires to work Mines—Implied Sanction by Act of Parliament—Statute of Limitations—Bar only from Discovery—Laches.*] The Plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863 while the adjoining mine was being worked by the *Hartlepool Railway Company*. The boundaries of the two mines were settled by mutual agreement in 1862, and after some lengthy negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An Act of Parliament was passed in 1863 by which the *Hartlepool Railway Company* were to sell their mines within five years; and in 1865 the said railway company was amalgamated with the Defendant company, and all their assets and liabilities were transferred to them:—*Held*, first, that although it was *ultrà vires* of the railway company to work mines, the Act of 1863 implied that the company were to have power to work their mines until the mines were sold, and that upon the amalgamation with the Defendant company the latter became liable for the wrongful acts of their predecessors:—Secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the Plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken:—And thirdly, that the *Statute of Limitations* only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the Plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. Ecclesiastical Commissioners for England *v.* North Eastern Railway Company - - - - - - 845

2. —— *Specific Performance—Mining Lease.*] *A.*, on the application of *B.* and *C.*, agreed to grant them a lease of a vein or seam of coal, called the *S.* vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called *X.*, at £100 per annum as certain or dead rent, and royalties of 9*d.* per ton for the coal and 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of £10 per acre, and to expend not less than £500 in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1*d.* per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one year's notice.—On action by *A.* for specific performance, *B.* and *C.* alleged that the *S.* vein did not exist under the farm, and it was proved that on search it had not been found, but counter-evidence was given to shew that the searches were insufficient:—*Held*, that, under the agreement, *B.* and *C.* had, in consideration of the dead-rent reserved, obtained license to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that *A.* was entitled to specific performance of the contract whether the *S.* vein existed or not. Jefferys *v.* Fairs - - 448

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—— In Court—Payment out of Court—Costs of two petitions - - - 207
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MORTGAGE — Improvement Commissioners — Mortmain - - - - 651
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—— Infant—Money for necessaries - 428
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—— Leasehold—Trade fixtures—Bankruptcy
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—— Life estate and remainder—Succession duty
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MORTGAGED ESTATE—Legal estate—Residuary gift - - - - - 70
See WILL. 11.

MORTMAIN—*Public Body—Improvement Commissioners, Mortgage by—Works, Rents, and Rates—Charity—Interest in Land.*] The Act for improving the town of *Aberystwith*, and supplying the inhabitants thereof with water, vested in the commissioners thereunder the works and the soil thereof, and authorized them to purchase land, to construct and carry on waterworks and gasworks, and to make rates upon occupiers of lands, and recover them by distress.—Mortgages by the commissioners whereby, under the borrowing powers conferred by the Act, they granted and assigned the "works, rents, and rates," authorized by the Act, to the lender until the sum borrowed should be repaid:—*Held*, to confer upon the lender an interest in land within the *Statute of Mortmain*. —*Holdsworth* v. *Davenport* (3 Ch. D. 185) distinguished. CHANDLER *v.* HOWELL - - 651

MOTHER—Custody of infant - - 157
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NECESSARIES—Money advanced for—Voidable assignment - - - - 428
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—— Representation of heir-at-law and next of kin - - - - - 230
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PARTITION—*Action for Evidence—Form of Judgment.*] Where in a partition action, parties claiming under a derivative title proposed to take a judgment directing inquiries as to the persons interested, with an order for sale of the estates dependent upon the result of those inquiries:—*Held*, that the only evidence necessary (in addition to the will whereby the tenancy in common was created) was a general affidavit concisely verifying the statement of claim.—Form of judgment in such an action. SENIOR *v.* HEREFORD [494

PARTNERSHIP—*Bankruptcy — Concealed Overdrawing by Partner—Proof on behalf of Joint against Separate Estate.*] *H.*, a banker, took into partnership *K.*, a country gentleman unacquainted with banking, who was not bound to bring in any capital or to attend to the business. *K.* did not acquaint himself with the accounts, though he occasionally came to the bank. *H.* from time to time fraudulently drew large sums out of the bank, and employed them in losing speculations on the *Stock Exchange*, concealing the overdrawings by means of fictitious entries in the books of the bank. *K.* never drew out anything. On the death of *H.* the bank was found utterly insolvent, and *K.* was adjudicated bankrupt. A decree was made for the administration of the estate of *H.*, under which the trustee in bankruptcy of *K.* claimed to prove for what was due from *H.* for moneys thus fraudulently drawn out:—*Held*, by the Court of Appeal (*James*, L.J., *Mellish*, L.J., and *Baggallay*, J.A.), affirming the decision of the Master of the Rolls, that he was entitled to prove:—*Held*, further, that the rule in *Clayton's Case* (1 Mer. 585) could not be applied to fraudulent overdrawings. Lacey *v.* Hill. Leney *v.* Hill - - - - - - 537

2. —— *Participation in Profits — Loan to Trader—Interest varying with Profits—Mortgage to secure Loan—Bankruptcy of Borrower—Rights of Trustee — Partnership Law Amendment Act*, 1865 (28 & 29 *Vict. c.* 86), *ss.* 1, 5.] A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender of the lease of the house where the business was carried on, and of the goodwill of the business. The trader became bankrupt:—*Held*, that the rights of the mortgagee under his mortgage were in no way affected by sect. 5 of the *Partnership Law Amendment Act*, 1865.—*Ex parte Macarthur* (40 L. J. (Bkcy.) 86), overruled. *Ex parte* Sheil. *In re* Lonergan - - 789

—— Agreement for future - - 596
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PATENT—*Infringement—Interlocutory Injunction —Undertaking by Defendant to account—Balance of Convenience—Stopping a Trade.*] Discussion of the principles on which the Court ought to act in determining whether to grant an interlocutory injunction to restrain an alleged infringement of a patent, or only to require the Defendant to keep an account. Plimpton *v.* Spiller - - 286

2. —— *Specification — Inconsistency between Claim and Description—Construction—"As described"—Insufficiency—Novelty.*] Patentees of lamp-burners claimed by their specification as their invention the construction of burners "in the manner described and illustrated in the figures, that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames."—The figures referred to shewed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old:—*Held*, that the claim could not be read as limited to

PATENT—*continued.*

burners with a double-slotted cone, and that the patent was bad for want of novelty.—A description in the specification of a lamp-burner omitted to state where the hole for the admission of air was to be:—*Held*, that the specification was insufficient. Hinks & Son *v.* Safety Lighting Company - - - - - 607

3. —— *Specification—Novelty — Prior Publication—Provisional Specification, Part of, omitted in Final Specification.*] A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification. Where a provisional specification contained an incomplete description, part of which was omitted in the final specification:—*Held*, that there was no prior publication of the part omitted so as to vitiate a subsequent patent of a similar invention on the ground of want of novelty. Stoner *v.* Todd 58

4. —— *Sealing—Date of Grant—Foreign Invention patented Abroad—Expiration of Foreign Patent*—15 & 16 *Vict. c.* 83, *ss.* 24, 25.] By the *Patent Law Amendment Act* (15 & 16 Vict. c. 83), s. 25, it is enacted that where foreign letters patent are granted for a foreign invention before the grant of a patent for such invention in the United Kingdom, the rights under the English patent shall cease on the determination of the foreign patent. An English patent for a foreign invention was dated the 17th of September, but sealed on the 17th of December, and between the two dates a foreign patent was granted:—*Held* (affirming the decision of the Master of the Rolls), that the patent must be taken to have been granted on the 17th of September, and therefore that the 25th section was not applicable.—The Court will at any time during the progress of a paient suit allow the Defendant to raise a fresh issue on the discovery of facts which could not with due diligence have been discovered before. Holste *v.* Robertson - - - - 9

PAYMENT—Out of Court—Cost of two petitions
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PENALTY—Building contract—Proof in bankruptcy - - - - - 724
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—— Companies Act, 1867—Reduction of capital
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—— Lands Clauses Act—Costs of two petitions
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PLAN—Property sold—Incorporation with contract - - - - - 1
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—— Parties — Administration action — Contingent interest - - - 413
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—— Reply—Form of - - - 341
See Practice. 22.
PLEDGE—*Equitable Mortgage—Deposit—Canada Bonds — Pledgee of Chattels — Right of Foreclosure.*] The doctrine that an equitable mortgagee by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels.—*A.* deposited with *B.* certain *Canada* railway bonds as security for a debt. On bill filed by *B.* for foreclosure or sale:—*Held*, that *B.* was entitled to an order for sale only. Carter *v.* Wake - - - - - - 605
POLICY—Life insurance—Equitable assignment —Deposit—Notice - - - 421
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POSSESSION—Bill of sale—Bankruptcy 496, 509
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POWER — *Appointment — Will — Appointment of Fund in Joint Tenancy—Excessive Execution—"Children"—Illegitimate Children—Intention—Reading Tenancy in Common—Gift in Default of Appointment—No Hotchpot Clause.*] *K.* by his will gave a fund upon trust for such of the "children" of his daughter *M.* (who was then married) as she should by will appoint, and, in default of appointment, for her children equally. The will contained no hotchpot clause. *M.* had several children, some of whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children *E.* and *C.*, their executors, administrators, and assigns, for their own use and benefit." *E.* was one of illegitimate and *C.* one of the legitimate children:—*Held*, reading *M.'s* testamentary appointment as indicating an intention to appoint the fund in moieties, that one moiety passed to *C.* under the appointment, and that the other moiety, *E.* not being an object of the power, was divisible among all the legitimate children, as in default of appointment.—*Humphrey* v. *Tayleur* (Amb. 136) and *Alexander* v. *Alexander* (2 Ves. Sen. 640) discussed. *In re* Kerr's Trusts - - 600
2. —— *Appointment — Will — "Children or Issue" — Exclusive Power.*] A testatrix bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my said daughter shall by deed or will appoint":—*Held*, that the daughter's power was exclusive.—*Garthwaite* v. *Robinson* (2 Sim. 43) disapproved of.—*Stolworthy* v. *Sancroft* (10 Jur. (N.S.) 762) considered. *In re* Veale's Trusts - - - - - - 61
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—— To borrow—Debentures - - 470
See Company. 1.
PRACTICE — *Administration Action by possible designated Next of Kin—Unascertained Class—Contingent Interest — Right of Action — Adding Parties—Rules of Court*, 1875, *Order* XVI., *r.* 2.] Bequest on the death of testator's daughters without issue to the persons who would be entitled under the statute if testator had then died intestate. Administration action brought in the lifetime of the daughters, and before they had had any issue, by persons who would then be next of kin if the daughters were dead without issue:—*Held*, on demurrer, that the Plaintiffs had only an expectation and not an interest, and were not entitled to maintain the action.—*Roberts* v. *Roberts* (2 Ph. 534) considered.—A Plaintiff can only be added under Rules of Court, 1875, Order XVI., rule 2, where there has been a *bonâ fide* mistake. Clowes *v.* Hilliard - - - - 413
2. —— *Amendment of Defence—Affidavit—Rules of Court*, 1875, *Order* XXVII., *r.* 1—*Costs.*] A Defendant who has put in a joint defence will be allowed, under Order XXVII., r. 1, of the Rules of Court, 1875, to put in a separate and amended statement alleging new grounds of defence, without any affidavit as to the nature of the new defence; but will be ordered to pay the costs rendered necessary by not having put in such defence at an earlier period, subject however to such directions as the Court may think fit to give where it sees that unnecessary or oppressive costs have been incurred by the Plaintiff in opposing the application. Cargill *v.* Bower - - 78
3. —— *Appeal for Costs—Right to open the whole Decree—Judicature Act*, 1873, *s.* 49—*Rules of Court*, 1875, *Order* LVIII., *r.* 6.] A bill was dismissed by a Vice-Chancellor without costs. The Plaintiff appealed against the whole decree, and his appeal was dismissed:—*Held*, that the Court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs. Harris *v.* Aaron - 749
4. —— *Appeal on Matter of Fact—Rebutting Evidence—Duty of Court of Appeal—Admission of fresh Evidence—Costs of printing Evidence—Rules of Court* 1875, *Order* LVIII., *r.* 12.] Although the Court of Appeal, when called on to review the conclusion of a Judge of first instance after hearing witnesses *vivâ voce*, will give great weight to the consideration that the demeanour and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet it will in a proper case act upon its own view of conflicting evidence.—Where a party is taken by surprise by a point made against him at the

PRACTICE—*continued.*

hearing, the Judge may, if he think right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal.—Where the *vivâ voce* evidence is voluminous, and the parties cannot properly argue the appeal without referring to all parts of it, the Court will allow the costs of printing it. BIGSBY *v.* DICKINSON - - - - - - - 24

5. —— *Appeal — Staying Proceedings.*] A party to whom costs have been ordered to be paid will not be restrained from enforcing the order pending an appeal to the House of Lords, if his solicitors undertake to refund if the order should be reversed. MORGAN *v.* ELFORD - - 352

6. —— *Appeal—Time for Appealing—Refusal of Application—Several Claims joined in one Application—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] Where several claims are joined in one application, and some of the claims are allowed, and some refused, an appeal from the refusal must be brought within twenty-one days from the date of the refusal, not from the date of perfecting the order. TRAIL *v.* JACKSON - - - 7

7. —— *Appeal — Time for Appealing — Ex parte Application for Extension of Time—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] After the expiration of the time limited for bringing an appeal, special leave to appeal will not be given upon an *ex parte* application. *In re* LAWRENCE. EVENNETT *v.* LAWRENCE - - - 139

8. —— *Appeal—Time for Appealing—Bankruptcy Appeal—Rules of Court*, 1875, *Order* LVII., *r.* 2; *Order* LVIII., *rr.* 2, 9, 15—*Bankruptcy Rules*, 1870, *r.* 143—*Bankruptcy Order of 26th May*, 1873.] The time for appealing to the Court of Appeal from orders made by the Chief Judge in Bankruptcy is now regulated by the Rules of Court, 1875.—Therefore, in estimating the twenty-one days allowed for appealing, Sundays are not to be excluded, and the material date is, not that of entering the appeal with the Registrar, but that of service of the notice of appeal on the Respondent.—Rule 143 of the Bankruptcy Rules, 1870, and the Bankruptcy Order of the 26th of May, 1873, do not now apply to appeals from the Chief Judge to the Court of Appeal. *Ex parte* VINEY. *In re* GILBERT - - - 794

9. —— *Appeal—Time for Entering Appeal—Time for Appealing from Winding-up Order—Rules of Court*, 1875, *Order* LVIII., *rr.* 2, 4, 8, 9, 15—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 24.] An appeal must be entered with the proper officer of the Court of Appeal before the day mentioned in the notice of appeal for the hearing, or if that day happens to be in a vacation when the office is closed, then before the next day of the sitting of the Court, otherwise the Respondent will be entitled to have the appeal motion dismissed as an abandoned motion, although the notice of appeal was given in time.—The time within which an appeal from an order on a petition to wind up a company under the *Companies Act*, 1862, must be brought is twenty-one days. *In re* NATIONAL FUNDS ASSURANCE COMPANY 305

10. —— *Appeal—Time for Appealing—Interlocutory Order included in Order on Further Consideration—Rules of Court*, 1875, *Order* LVIII., *r.* 15.] Where an order on an interlocutory application and an order on further consideration are made at the same time and are included in one order, an appeal from the order on the interlocutory application must nevertheless be brought within twenty-one days, although such order in effect determines the issue in the cause. CUMMINS *v.* HERRON - - - - 787

11. —— *Appeal—Time for Appealing—Order under the Trustee Relief Act—Rules of Court*, 1875, *Order* LVIII., *r.* 9.] The time within which an appeal must be brought from an order made under the *Trustee Relief Act* is twenty-one days. *In re* BAILLIE'S TRUSTS - - - 785

12. —— *Bankruptcy of Plaintiff — Rules of Court*, 1875, *Order* L., *r.* 1—*Motion to dismiss for want of Prosecution—Abatement—Notice to Trustees.*] Where a Plaintiff had made default in delivering his statement of claim, and had since become bankrupt,—Notice of motion to dismiss for want of prosecution was ordered to be served on the trustees in bankruptcy, although under Rules of Court, 1875, Order L., rule 1, the action had not become abated by the bankruptcy. WRIGHT *v.* SWINDON, MARLBOROUGH, AND ANDOVER RAILWAY COMPANY - - - 164

13. —— *Consolidation of Actions—New Defendant—Rules of Court*, 1875, *Order* XVI., *rr.* 14, 15.] Where two actions had been ordered to be consolidated, on an application by the Plaintiff to add new Defendants to the consolidated action before trial, and to make *W.*, one of the present Defendants, a party to the action in a representative character, the Court, under Rules of Court, 1875, Order XVI., rules 14, 15, ordered that the proposed new Defendants should be added without service of any writ, and that *W.* be made a Defendant in his representative character without any further indorsement on any writ,—such order to take effect unless the new Defendants and *W.* should respectively shew cause to the contrary within eight days after service thereof. *In re* WORTLEY. CULLEY *v.* WORTLEY. HARVARD *v.* STOREY - - - - - 180

14. —— *Consolidation of Actions—Different Plaintiffs against the same Defendants—Rules of Court*, 1875, *Order* LI., *r.* 4.] Order LI., rule 4, of the Rules of Court, 1875, adopts the old practice at Common Law, and the Court can only consolidate actions at the instance of Defendants, and not on the application of a number of different Plaintiffs against the same Defendants. But in such cases the Court may, under the general jurisdiction, enlarge the time for taking the next step in several of a series of actions till one of them has been tried as a test action. AMOS *v.* CHADWICK. ROBINSON *v.* CHADWICK. SMITH *v.* CHADWICK 869

15. —— *Contempt of Court—Breach of Injunction—Notice by Telegram.*] A sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a *fi. fa.* after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order

PRACTICE—*continued.*

restraining further proceedings under the writ: —*Held*, that the sheriff's officer and the auctioneer had been guilty of contempt of Court, and that they must pay the costs of a motion to commit them. *In re* Bryant - - - 98

16. —— *Counter-claim—Joinder of Defendant —Claim for Alternative Relief—Rules of Court*, 1875, *Order xvi., rr.* 3, 6.] Under Rules of Court, 1875, Order xvi., rules 3, 6, a person cannot be joined as Defendant to a counter-claim against whom there is only a claim for relief in one of two inconsistent alternatives. Evans *v.* Buck. Buck *v.* Evans - - - - 432

17. —— *Counter-claim between co-Defendants —Notice to co-Defendant by delivery of Pleading—Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order xvi., r.* 17; *Order xxii., r.* 5.] Questions between co-Defendants may be raised by a pleading which states both a defence as against the Plaintiff and a claim against a co-Defendant, but such pleading is not a counter-claim under Order xxii., rule 5, and should not be so intituled.—Delivery of such pleading to the co-Defendant is sufficient notice under Order xvi., rule 17.—*Shephard* v. *Beane* (2 Ch. D. 223) not followed. Furness *v.* Booth - - 586

18. —— *Counter-claim — Pleading — Judicature Act*, 1873—*s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Order xvi., rr.* 17, 18; *Order xxii., rr.* 5, 6, 9.] First mortgagee being sole Defendant to an action by second mortgagees for an account of what was due to them respectively, and to have a contract for sale entered into by the first mortgagee completed, and the sale moneys applied accordingly, made the purchaser co-Defendant with the Plaintiffs to a counter-claim for specific performance by the purchaser with the concurrence of the Plaintiffs, alleging that their concurrence was a term of the contract, and that the purchaser refused to complete without it. The defence and counter-claim having been served on the purchaser under Order xxii., rules 5, 6, he moved under Order xxii., rule 9, to have so much of the counter-claim as affected him excluded:—*Held*, that, there being a question between the Defendant and the Plaintiffs "along with" the purchaser which the Defendant was entitled to raise by cross action, the purchaser was properly made a Defendant to the counter-claim, and the motion refused with costs accordingly. Dear *v.* Sworder. Sworder *v.* Dear - - 476

19. —— *Hearing in Private.*] *Semble*, the High Court of Justice has no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of an action, or in those cases where the practice of the old Ecclesiastical Courts as to hearing *in camerâ* is continued. Nagle-Gillman *v.* Christopher - - - - - 173

20. —— *Interrogatories by Vendor — Specific Performance — Purchase by Trustees — Rules of Court*, 1875, *Order xxxi., r.* 5.] In an action for specific performance of an agreement to sell the remainder of an underlease of house property to Plaintiffs, who were trustees for a married woman, interrogatories by the Defendant, who had notice that they were trustees, but no notice of the actual trusts, for the purpose of establishing that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be struck out as irrelevant. Mansfield *v.* Childerhouse - - - - - - 82

21. —— *Official Referee—Judicature Act*, 1873, *ss.* 56–59—*Order as to Production of Documents—Appeal from—Rules of Court*, 1875, *Orders xxxi., r.* 11; *xxxvi., r.* 32.] In actions which have been referred under the 57th section of the *Judicature Act* of 1873, orders for the production of documents may be made by the Judge who has directed the reference. Whether they can also be made by the referee, *quære*.—An application in the nature of an appeal will lie to such Judge from any order made by a referee. *In re* Leigh, deceased. Rowcliffe *v.* Leigh - - - - 661

22. —— *Reply — Form of Reply — Rules of Court*, 1875, *Orders xix., rr.* 2, 4, 14, 20; *xxiv., r.* 2; *xxvii., rr.* 1, 2; *App. C., Forms* 6–24.] A Plaintiff is entitled to reply by traverse, confession and avoidance, or both combined. Hall *v.* Eve - - - - - - 341

23. —— *Representation of Heir-at-Law, Next of Kin, or Class, before Determination of Question of Construction—Rules of Court*, 26*th June*, 1876, *Order xvi., r.* 9*a*.] Where upon the construction of a will questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, the Court made an order under the Rules of 26th of June, 1876, Order xvi., rule 9a, appointing persons to represent the various classes of representatives of which some or one might be held to be entitled, before the questions of construction came on to be decided. *In re* Peppitt's Estate. Chester *v.* Phillips - 230

24. —— *Security for Costs—Dismissal of Appeal for want of Prosecution—Rules of Court*, 1875, *Order lviii., r.* 15.] An Appellant who had been ordered to give security for the costs of an appeal from a decree failed to do so for nine months. At the end of that time, which was more than a year after the decree, the Respondent moved to have the appeal dismissed with costs for want of prosecution, and the delay not being explained the Court ordered accordingly. Judd *v.* Green - - - - 784

25. ——*Special Case—Discretion of the Court —Contingent Event—Parties not in esse—Creation of Fictitious Interest*—13 & 14 *Vict. c.* 35, *s.* 14.] Upon a special case to obtain a decision whether persons not *in esse* would be entitled, under certain circumstances which might never arise, to a share in property, the Court declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question.—Where the interests of the parties to a special case are not of such a nature as to give the Court jurisdiction to decide the questions, the Court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision. Bright *v.* Tyndall - - - - - 189

PRACTICE—*continued.*

26. —— *Trial by Jury—Action in Respect of Nuisance—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 26—*Rules of Court, Dec.* 1876, *Order* XXXVI., *r.* 29*a*—*Form of Issues.*] The Court will not, in the absence of special cause, by the exercise of the discretion given by Rules of Court, 1875, Order XXXVI., rule 26, deprive a Defendant in a nuisance case of his statutory right under Order XXXVI., rule 3, to have the question, or issues of fact, in the action tried by jury at the assizes for the county in which the works from which the alleged nuisance proceeds are situated.—And, having regard to such statutory right, it is a sufficient reason to be stated (as required by Rules of Court, December, 1876, Order XXXVI., rule 29a), on the order directing a trial at the assizes, and not in the Chancery Division, that the Defendant desires a trial by jury, and that the Court sees no reason to the contrary. WEST *v.* WHITE - - 631

27. —— *Trial by Jury—Trial before a Judge of Chancery Division—Judicature Act*, 1873, *ss.* 29, 30, 37—*Rules of Court*, 1875, *Order* XXXVI., *rr.* 1, 4, 8, 16, 29, 29*a*; *Order* XXXIX.; *Order* XLI., *rr.* 1, 5.] A trial by jury cannot be heard before a Judge of the Chancery Division. Actions commenced in the Chancery Division, if they are to be tried by a jury, must be set down in the general list, to be tried by one of the Judges of the Common Law Divisions.—*Clarke* v. *Cookson* (2 Ch. D. 746) approved. WARNER *v.* MURDOCH. MURDOCH *v.* WARNER - - - 750

—— Costs—Lands Clauses Act - - 207
See LANDS CLAUSES ACT.

—— Parties—Representative dispensed with 421
See INSURANCE.

PRECATORY TRUST—To do justice to testator's relatives - - - - 238
See WILL. 14.

PRESSURE—Fraudulent preference - 555
See BANKRUPTCY. 12.

PRESUMPTION—Gift to issue - - 165
See WILL. 1.

—— Of Death—Mortgagor - - - 144
See LIMITATIONS, STATUTE OF.

PRINCIPAL AND AGENT—*Collusion by Agent and Purchaser — Joint Liability.*] *Held*, by *Malins*, V.C., that where an agent for the sale of an estate colludes with a purchaser and in consideration of a bribe or *honorarium* allows the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, and the transaction is concealed from the vendor, both agent and purchaser will be held jointly and severally liable to pay to the vendor the increased amount obtained by the sub-sale.—On appeal, the Court, being of opinion on the evidence and correspondence that the bargain between the agent and the owner was that the agent should have whatever the estate fetched above a certain price, dismissed the bill without giving any opinion on the above points. MORGAN *v.* ELFORD - - - - - - 352

—— Stockbroker - - - - - 123
See BROKER.

—— Factor—Set-off - - - - - 133
See SET-OFF.

PRINCIPAL AND SURETY—Wife joining in mortgage by husband. - - 639
See DOWER.

PRINTING—Evidence—Costs - - 24
See PRACTICE. 4.

PRIORITY—Assignment of trust fund—Notice [101
See ASSIGNMENT.

—— Deposit by railway company—Application of [18
See COMPANY. 3.

—— Patent—Publication - - - 58
See PATENT. 3.

—— Registered and unregistered bills of sale 23
See BANKRUPTCY. 3.

PRIVATE HEARING—Jurisdiction - 173
See PRACTICE. 19.

PRODUCTION OF DOCUMENTS - - 661
See PRACTICE. 21.

PROFITS—Agreement that fund shall be considered as - - - - 213
See COMPANY. 7.

—— Partnership—Participation in - 789
See PARTNERSHIP. 2.

PROOF—Bankruptcy - - 246, 724
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—— Bankruptcy—Estate of co-partner—Joint and separate estate—Fraudulent overdrawing [537
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—— Winding-up - - - 33, 34, n.
See COMPANY. 12, 13.

PROTECTED TRANSACTION—Bankruptcy 524
See BANKRUPTCY. 18.

PROVISIONAL SPECIFICATION - - 58
See PATENT. 3.

PUBLICATION—Copyright—Periodical - 163
See COPYRIGHT. 2.

—— Patent—Priority - - - 58
See PATENT. 3.

PURCHASE-MONEY—Apportionment—Trust and absolute property - - - 802
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PURCHASER FOR VALUE—Voluntary settlement [85, 483
See VOLUNTARY SETTLEMENT. 1, 2.

QUALIFICATION OF DIRECTOR - - 222
See COMPANY. 5.

QUASI PARTNERSHIP - - - 246
See BANKRUPTCY. 17.

RAILWAY—*Abandonment—Bond for Completion of Railway—Deposit—Railways Abandonment Act*, 1869 (32 & 33 *Vict. c.* 114), *s.* 5—*Warrant of Board of Trade—Debt incurred on Account of Promotion of the Company.*] A solicitor was employed in the promotion of a railway and in obtaining the Act for its incorporation. He was then appointed solicitor of the company, and was employed in obtaining two other Acts by which the scheme was amended and fresh powers granted. The undertaking proved abortive, and the railway was never constructed. A warrant of the Board of Trade was obtained under the *Railways Abandonment Act*, 1869, for the abandonment of the rail-

RAILWAY—*continued.*

way, which contained the usual clause that the bond which had been given for the completion of the railway should be assets of the company:—*Held* (affirming the decision of *Malins*, V.C.), that the costs of the solicitor incurred in getting up the company, and, after its incorporation, in obtaining the subsequent Acts, were costs incurred on account of the promotion of the company within the 5th section of the *Railways Abandonment Act*, 1869, and ought not to be paid out of the bond. *In re* Barry Railway Company - - 315

2. —— *Railways Regulation Act* (5 & 6 *Vict. c.* 55), *s.* 6—*Opening of Railway—Inspector's Report—Jurisdiction—Board of Trade.*] Where an inspector of the Board of Trade reports to the Board of Trade that the opening of a railway will be attended with danger to the public by reason of the incompleteness of the works, and gives the grounds of his opinion, the requisitions of the 5 & 6 Vict. c. 55, s. 6, are satisfied—the Board of Trade has exclusive jurisdiction in the matter—and the Court will not enter into the question whether the reasons given by the inspector do not shew on the face of the report that he has come to a wrong conclusion. Attorney-General *v.* Great Western Railway Company - - - - 735

RAILWAY COMPANY—Working mines *ultrà vires* - - - - - 845
See Mine. 1.

RATES—Mortgage of - - - 651
See Mortmain.

REDUCTION OF CAPITAL - - 327, 827
See Company. 9, 10.

REFUSAL OF APPLICATION—Appeal—Time 7
See Practice. 6.

REGISTRATION—Bill of sale—Bankruptcy
See Bankruptcy. 3, 4, 5. [23, 503, 682

—— Contract for paid-up shares - - 140
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—— Resolution for composition - - 293
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REPLY—Form of - - - - 341
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REPRESENTATIVE—Absence of—Payment of policy money to creditor - - 421
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—— Appointment of—Rules of Court, Order xvi., r. 9 (a) - - - - - 230
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RESCISSION OF CONTRACT—Sale by periodical instalments - - - - 108
See Sale of Goods.

RESIDUARY GIFT—"Money, cattle, &c." 800
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See Will. 11.

RESIDUE—Costs of administration 53, 841
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RESOLUTION FOR COMPOSITION—Registration
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RESOLUTION FOR LIQUIDATION—Meeting at wrong place - - - - 519
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RESTRAINT OF TRADE - - - 636
See Covenant. 1.

RESTRICTIVE COVENANT—Covenant running with land - - - - 718
See Covenant. 2.

REVERSION—Wife's real estate - - 175
See Husband and Wife. 1.

REVERSIONARY INTEREST—Personalty—Succession Duty - - - 583
See Succession Duty. 2.

RIGHT OF COMMON—*Manor—Freeholders and Copyholders—Right of Lord to take and sell Marl—General Words in Conveyance—Injunction, Form of.*] General words in a conveyance by the lord of a manor of (*inter alia*) a small parcel of land which had been copyhold and was afterwards surrendered to extinguish the copyhold tenure, *held* not to recreate rights of common.—The lord of a manor may take gravel, marl, loam, and subsoil in the waste, for his own use and for the purpose of sale, so long as he does not infringe upon the rights of the commoners. On the question whether the loam is taken to such an extent as to interfere with right of common, the *onus probandi* is on the tenant and not on the lord as in the case of approvement. Hall *v.* Byron - - 667

RULES OF SUPREME COURT, 1875, Order XVI., r. 2 - - - - - - 413
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—— **Order XIX., rr. 2, 4, 14, 20** - - 341
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—— —— rr. 1, 2 - - - - 341
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—— —— r. 11 - - - - 661
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—— —— rr. 3, 26, 29 (a) - - - 631
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—— —— r. 32 - - - - 661
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—— Order L., r. 1 - - - - 164
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—— —— r. 9 - - - - 785
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SALE—Order for—Partition—Evidence - 494
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SALE OF GOODS—*Rescission of Contract—Contract for Sale by Periodical Instalments—Insolvency of Purchaser—Right of Vendor to refuse to deliver without Cash Payment.*] The *C. Iron Company* in October, 1874, contracted to supply the *P. Steel Company* with iron at a certain price, to be delivered in monthly instalments and to be paid for, as to some, by bills at four months, and as to the rest, by cash at a certain length of credit. The instalments were delivered till the month of February, 1875, inclusive, in which month the purchasing company called a meeting of their principal creditors, and stated that they were carrying on the business at a loss and were short of working capital, and asked for an extension of credit in their existing contracts, which however was refused them. The selling company then refused to deliver any more iron except upon immediate cash payments, and in consequence of that refusal the purchasing company gave notice to rescind the contract. The purchasing company continued to carry on the business after the meeting, and endeavoured to raise fresh capital by issuing preference shares, but in June, 1875, they passed a resolution for winding up. The selling company claimed to prove for damages for breach of the contract against the estate of the purchasing company:—*Held* (affirming the decision of the Master of the Rolls), that there was no such declaration of insolvency at the meeting in February as to justify the selling company in refusing to deliver iron except for cash payments; and consequently that the purchasing company had a right to rescind the contract; and the claim for damages was dismissed.—In order to justify the vendors in such a case in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods. *In re* PHŒNIX BESSEMER STEEL COMPANY. *Ex parte* CARNFORTH HÆMATITE IRON COMPANY - - - 108

SEALING OF PATENT—Date of grant - 9
See PATENT. 4.
SECURITY—Debtor's summons - - 105
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—— For costs - - - - - 784
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SEPARATE USE—Cheque payable to wife's order
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—— Directions to pay income for maintenance of wife - - - - - 233
See WILL. 16.
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SET-OFF—*Sale by Factor as Principal.*] A person purchasing goods from a factor who sells them in his own name can set off a debt due to him from the factor personally in the same way as if the factor were the principal, unless the purchaser has notice that the factor is not the principal; and this right is not affected by the fact that the factor in selling in his own name without disclosing the agency is acting in contravention of the express directions of his principal.—*Semenza* v. *Brinsley* (18 C. B. (N.S.) 467) explained. *Ex parte* DIXON. *In re* HENLEY - - 133

SETTLED ESTATES ACT, 1856 (19 & 20 *Vict.* c. 120), *ss.* 1, 17—*Settled Estates (Amendment) Act*, 1874 (37 & 38 *Vict.* c. 33), *s.* 2—*Life and Absolute Interests—Settlement—Children Beneficiaries—Service of Petition on Father.*] By will real property was vested in trustees upon trust for *J.* for life, and after her death for the benefit of her children, and in default of any, for *S.* and *E.*, but if either should die without leaving issue who should attain twenty-one, in trust for the survivor absolutely. *J. S*, and *E.* had a power of appointment, and liberty to sell and convert any part of the property. *E.*, on her marriage, settled her real and personal estate. She had now four children infants. *J.* was living and unmarried. A conditional contract had been entered into for the sale of a part of the property. On a petition by the trustees and *J.* under the *Settled Estates Act*, 1856;—*Held*, that the children of *E.* were necessary parties, and that notice of the petition must, under sect. 2 of the *Settled Estates (Amendment) Act*, 1874, be served on their father. *In re* DENDY - - - - - 879

SETTLEMENT—Marriage—Agreement to settle wife's real estate - - - 175
See HUSBAND AND WIFE. 1.
—— Voluntary - - - 85, 483
See VOLUNTARY SETTLEMENT. 1, 2.

SEWER—*Borough Corporation—Power of Sewering Streets—Private Road—Compulsory Powers—Local Act—Special and General Provisions—Saving of General Rights—"Streets"—Vesting Sewers in Corporation—Property in Subsoil—Easement—Interpretation of Statutes—Consolidation Acts—Public Health Act*, 1848 (11 & 12 *Vict.* c. 63), *s.* 45—*Sewage Utilization Act*, 1865 (28 & 29 *Vict.* c. 75), *s.* 4—*Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 4, 16.] The Plaintiffs were owners of a private road in the borough of *Oldham*, called *Shaw Road*, having a row of houses along and fronting each side.—The *Oldham Borough Improvement Act*, 1865—the

SEWER—*continued.*
preamble of which recited that, for the sake of convenience, it was intended to reduce into one Act such of the provisions of the *Public Health Act*, 1848, and the *Local Government Acts*, 1858 and 1861, as were then applicable to the borough —enacted as follows:—Sect. 4 discontinued the application of such provisions to the borough; sect. 16 empowered the borough corporation to order any private street (including "road") to be sewered by the owners of land in the street, and (sect. 18), in case of default, to sewer it themselves at the expense of such owners; sect. 27 provided (sub-sect. 1) that the corporation might purchase all private rights in "the road or street called *Shaw Road*;" (sub-sect. 3) that on completion of such purchase "the said road or street" should be subject to all the provisions relative to the sewering of streets in the borough; (sub-sect. 4) that the power of compulsorily purchasing such rights should not be exerciseable after five years; and (sub-sect. 5) that nothing in the Act should empower the corporation to purchase or take by compulsion any interest in the soil of the said road or street; sect. 59 vested all sewers in the corporation; sect. 60 empowered the corporation to make "under any streets" sewers necessary for the drainage of the borough; sect. 62 provided for compensation; and sect. 366 saved such general rights as the corporation had "independently of that Act."—The local Act omitted all notice of the *Sewage Utilization Act*, 1865, which had been passed only six days previously, and which empowered corporations to construct such sewers as they might deem necessary, and for that purpose to exercise all the powers of constructing sewers vested in local boards by sect. 45 of the *Public Health Act*, 1848, which empowered any local authority to carry any sewer under any "street" (including "road") "or place laid out as or intended for a street."—The *Public Health Act*, 1875, which repealed the *Public Health Act*, 1848, and the *Sewage Utilization Act*, 1865, consolidated their provisions, sect. 16 substantially re-enacting sect. 45 of the Act of 1848.—In 1876 the corporation of *Oldham*, having issued an order, which was not complied with, that *Shaw Road* should be sewered by the owners, commenced excavating the road for the purpose of constructing a sewer themselves, without any previous agreement for the purchase of the Plaintiffs' rights in the road:—*Held*, upon motion by the Plaintiffs for an injunction, 1, that, having regard to the special provisions of sect. 27 of the local Act, the corporation's proceedings were not authorized by sects. 16 and 18, or sect. 60, of that Act; 2, that their proceedings were authorized by the saving clause (sect. 366) of that Act, the powers under the *Sewage Utilization Act*, 1865, having been thereby preserved to them, and continued by sect. 16 of the *Public Health Act*, 1875; and, 3, that *Shaw Road* was a "street" within the *Public Health Act*, 1875.—Motion therefore refused.—The preamble of an Act of Parliament cannot be resorted to in order to ascertain the intention of the Act, unless there is an ambiguity in the enacting part.—General provisions in an Act of Parliament do not override special provisions; so that where an Act contains special provisions as to particular property, they must be read as exceptions from general provisions, whether contained in the same or any other Act.—The usual clause in local Acts vesting sewers in the sewer authority confers an absolute property in that part of the subsoil occupied by any sewer, and not merely an easement or right of sewerage.—The principles of interpreting and reconciling Acts of Parliament considered. Taylor *v.* Corporation of Oldham [395

SHARES—Agreement to take—Withdrawal of application - - - - 774
See Company. 4.
—— Paid-up - - - - - 140
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—— Trafficking in - - - - 327
See Company. 10.

SHIFTING USE—Eldest son - - 251
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See Trade-mark.

SOLICITOR—*Articled Clerk—Actual Service—Agreement as to Future Partnership—Attorneys and Solicitors Act* (6 & 7 *Vict. c.* 73).] *J.*, an articled clerk with a fixed salary, agreed with *S.*, the solicitor whom he was serving, to receive all the profits of the business, and to account to him for them at the expiration of the articles, and if they should go into partnership on *J.* being admitted, that *S.* should have the amount of such profits as his share of the capital. The business, most of which was introduced through *J.*'s connection, was managed by him on this footing, he receiving and paying all moneys, and his name appearing outside the office door. On the completion of his term of service, *J.* applied to be admitted to the final examination, but the examiners considered that the provisions as to service in the *Attorneys and Solicitors Act* had not been complied with:—*Held*, that, on the evidence in the case, there had been actual service during the term of the articles within the meaning of the Act, and that *J.* should be admitted to the examination. *Ex parte* Joyce - - - 596

2. —— *Articled Clerk—Implied Cancellation of Articles by Mutual Consent—Five Years' Service —Reckoning Detached Periods*—6 & 7 *Vict. c.* 73, *s.* 13.] *W.* was articled in 1861 to *R.*, a solicitor, for five years, but left him after two years' service, the articles with *R.*'s consent being considered as cancelled. In 1864 he was "re-articled" to *R.* for the remaining three years, and under these new articles he continued in *R.*'s service for two years, when he left on account of ill-health and under medical advice. In 1869 he was "assigned and re-articled" by *R.* to, and served with, *L.* for the remaining one year.—An application by *W.* that the several periods of service under the three articles might be reckoned as constituting the full five years' service, was granted, it being *held* that both the first and second articles had been cancelled "by mutual consent" within sect. 13 of 6 & 7 Vict. c. 73. *Ex parte* Williamson - 581

3. —— *Articled Clerk—Service under Articles —Interruption of Service—Completion of Term*

SOLICITOR—*continued.*

after Articles had expired—6 & 7 *Vict. c.* 73, *s.* 3.] In September, 1870, *A.* was articled to his father, an attorney, for five years, and served till October, 1873, when his father by an indenture assigned his services to *D.* for fifteen months, after which *A.* returned to his father and served under the original articles till September, 1875. The Court of Queen's Bench having held that the service under the assignment could not be reckoned as part of the five years' service, *A.* continued to serve with his father for another fifteen months, but without fresh articles:—*Held*, that *A.* had not duly served under the contract within the meaning of 6 & 7 Vict. c. 73, s. 3, and that he must complete his five years' service under fresh articles for fifteen months, but that, under the circumstances, he might be allowed to go in for his examination. *Ex parte* ADAMS - 39

4. —— *Lien—Trustee in Bankruptcy—Lien of Solicitor of Trustee—Bankruptcy Rules*, 1870, *r.* 249.] The trustee of a bankrupt's estate appointed a solicitor, whose appointment was duly confirmed, and who transacted considerable professional business for the trustee as such. After several years the trustee was removed by the creditors, and a new trustee appointed, who called upon the solicitor to hand over all documents relating to the estate to himself or his solicitor. The solicitor of the old trustee opposed this application on the ground that he had a lien on them for his costs:—*Held* (affirming the decision of the Registrar), that the solicitor had a lien upon all documents, the fruits of his own labour or expense. *Ex parte* YALDEN. *In re* AUSTIN - - - - - - 129

5. —— *Order for Taxation—Lien on Papers for further Costs—Attorneys and Solicitors Act* (6 & 7 *Vict. c.* 73), *s.* 38.] In making an order for taxation under the *Attorneys and Solicitors Act* (6 & 7 Vict. c. 73), s. 38, it is discretionary with the Court whether or not to add the order for the delivery up of papers.—A solicitor delivered to his client a bill of costs incurred in pending suits in which he afterwards, with his client's knowledge, incurred further costs. While the suits were still pending the client obtained an order of course for taxation and delivery up of papers, whereupon the client delivered a bill for the further costs. On a motion to discharge the order on the ground that the solicitor had a lien on the papers for the further costs:—*Held*, that the order should be amended so as to include both bills.—*Semble*, the proper form of order in such a case would be a simple order for taxation, without ordering the papers to be delivered up.—*In re Teague* (11 Beav. 318) disapproved.—*Ex parte* JARMAN - - - - - - 835

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—— —— s. 38 - - - - 835
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See Sewer.

SUCCESSION DUTY—*Sale by Mortgagee—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 1 15, 20, 33, 38—*Mortgages of Life Estate and R mainder before Act, and Sale by Mortgagees aft —Mortgagee Agent for Mortgagor—"Succession —Liability to Duty—"New Succession" creat by Purchaser—"Alienation not conferring ne Succession"—Duty Payable on last Succession Double Duty—Vendor and Purchaser Act*, 18 (37 & 38 *Vict. c.* 78), *s.* 9.] In 1831, under t will and upon the death of a testator, his nephe *A.* became tenant for life, and *A.'s* eldest son, *I* tenant in tail of a freehold estate, subject to outstanding legal mortgage in fee. In 1849 mortgaged his equitable life estate to certain p sons, and in 1852, *B.*, having previously barr his estate tail, mortgaged his equitable remaind in fee to the same persons, each mortgage bei for a distinct sum, and containing the usual pow of sale. Various transfers of the mortgages fr father and son took place, in the course of whic subsequently to the passing of the *Succession Du Act*, 1853, the outstanding legal estate was got In 1863 the then mortgagees, in exercise of th powers of sale, sold the entire estate by auction *C.* in fee for a lump sum, but in the conveyance *C.* it was recited (as the fact was) that the p chase-money had been duly apportioned betwe the life estate and remainder. *C.* then died, havi by his will devised the estate to his nephew *D.* life with remainders over, whereupon *D.* enter into possession and paid duty on his succession his uncle at 3 per cent. to the full amount as the fee simple.—The trustees of *C.'s* will then s the estate to a purchaser, who raised the object that although the sale to *C.* was made under pow contained in mortgages existing before the passi of the Act, succession duty had nevertheless

SUCCESSION DUTY—*continued.*
tached, and would become payable in respect of *B.'s* succession upon the death of *A.*, who was still living:—*Held*, upon a summons taken out by the vendors under sect. 9 of the *Vendor and Purchaser Act*, 1874,—First: That the mortgages of the life estate and remainder, though made to the same persons, were in all respects independent mortgages, and at the passing of the *Succession Duty Act* were not merged either at law or in equity; that the sale by the mortgagees under their powers in 1863 was to be regarded as a joint sale of the two interests, and could be supported only upon the principles applicable to joint sales of two trust properties by two sets of trustees; and that accordingly, inasmuch as a higher price was clearly obtainable by selling the fee simple in possession rather than the life estate and remainder separately, and as the purchase-money had been duly apportioned between the two interests, the sale was a proper exercise of the powers;—Secondly: That at the date of the *Succession Duty Act A.* and *B.* were respectively entitled in equity as tenant for life and remainderman in fee, subject only to money charges on their respective estates, and, therefore, that *B.* was then entitled to a "succession" within sect. 2 of the Act; and that since the mortgagees sold, in effect, as the agents of *A.* and *B.*, *C.*, as purchaser from them, took *B.'s* succession by "alienation not conferring a new succession" within sect. 15, and became liable to duty accordingly; but, Thirdly: That, as a "new succession" had been created by *C.*, duty then became payable on that succession only, and therefore, the full amount having been paid by *D.* on his taking under such new succession, the estate was discharged from all further duty on *A.'s* death.—"By alienation or by any title not conferring a new succession," in sect. 15 of the *Succession Duty Act*, 1853, means, "either by alienation or by any title other than alienation, in both cases not conferring a new succession."—Settlement after the *Succession Duty Act*: *A.* tenant for life; *B.* remainderman in fee. *A.* and *B.* convey their estates for money to *C.* in fee. *C.* dies, having devised to *D.* in fee. *D.* pays duty on his succession from *C.*, and then sells: On *A.'s* death no more succession duty will be payable than has already been paid by *D.* *In re* Cooper and Allen's Sale to Harlech - - 802

2. —— *Settlement of Reversionary Interest in Personalty—Payment by Tenant for Life—Right to Repayment out of Corpus—Succession Duty Act* (16 & 17 *Vict. c.* 51), *s.* 32.] Where a person absolutely entitled to a reversionary interest in personalty settled the same on the usual trusts of a marriage settlement, and, on the reversion falling in, paid the whole of the succession duty, which had become payable thereon, out of his own moneys:—*Held*, that, having regard to sect. 32 of the *Succession Duty Act* (16 & 17 Vict. c. 51), he was entitled to be recouped out of the corpus of the settled fund. Cuddon *v.* Cuddon 583

SUMMONS IN CHAMBERS — Several claims joined in one—Appeal - - 7
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SURVIVORSHIP—Period of distribution - 210
See Will. 12.

TAXATION OF COSTS—Order for delivery of papers - - - - 835
See Solicitor. 5.

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TENANT FOR LIFE—Payment of succession duty on reversion - - - 583
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—— Power of sale—Surviving trustees - 454
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—— Limits of—Compulsory powers - 588
See Compulsory Powers.

TRADE—Carrying on, by executor - - 509
See Bankruptcy. 2.

—— Inconvenience of stopping - - 286
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—— Restraint of—Covenant - - 636
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TRADE-MARK — *Piracy — Discovery Action — Shippers.*] An action will lie against shipowners who have shipped goods bearing counterfeits of Plaintiff's trade-marks for discovery of the names of the consignor from whom the goods were received. Orr *v.* Diaper - - - 92

TRADER—Execution against—Act of bankruptcy —Sum exceeding £50 - - - 521
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—— In bankruptcy—Bond - - - 250
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—— In bankruptcy—Solicitor of—Lien on deeds
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—— Power of sale—Surviving trustees - 454
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—— Purchase by—Specific performance—Interrogatories - - - - 82
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—— Sale by—Joining with owner of another property - - - - 802
See Vendor and Purchaser. 3.

TRUSTEE ACTS—*Leaseholds—Intestacy—Vesting Order—Reappointment of Trustees previously appointed—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *ss.* 32, 34.] Where a sole trustee of leaseholds had died intestate, and had no legal personal representative, and new trustees had been duly appointed under the settlement, the Court reappointed the same two persons trustees, and made an order vesting the leaseholds in them. The decision of the Master of the Rolls reversed. *In re* Dalgleish's Settlement - - 143

2. —— *Lunatic Trustee — Vesting Order — Lands in Ireland—Trustee Act*, 1850, *ss.* 3, 54, 56 —*Trustee Extension Act*, 1852, *s.* 10.] The surviving trustee of property, consisting partly of land in *Ireland*, having become lunatic, an order was made upon a petition instituted both in Lunacy and in the Chancery Division, appointing new trustees and vesting the Irish land in them. *In re* Lamotte, a Lunatic - - - 325

TRUSTEE RELIEF ACT—Appeal from order—Time for appealing - - 785
See Practice. 11.

ULTRA VIRES—Directors of company—Trafficking in shares - - - 327
See Company. 10.

—— Railway company—Working mines - 845
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UMPIRE—Appointment of—Metropolitan Building Act - - - - 200
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UNCERTAINTY—Will—Gift to children—Mistake in number - - - 41
See Will. 10.

UNCLAIMED DIVIDENDS — Administration — Creditors not claiming - - 757
See Administration. 4.

UNDISCHARGED DEBTOR—After-acquired property - - - 533, 689
See Bankruptcy. 20, 21.

VENDOR AND PURCHASER—*Conditions of Sale —Frame of Conveyance.*] Trustees for sale of a freehold messuage and hereditaments, who sell under a condition that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any," are entitled to have the words "subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any," inserted in the habendum of the conveyance, although it is not shewn, nor asserted, that the property is subject to any of the liabilities so specified. Gale *v.* Squier - - - 226

2. —— *Limited Interest—Specific Performance with Abatement.*] By marriage settlement real estate was limited to such uses as *A.* and *B.* (husband and wife) should appoint, and in default of appointment to the use of trustees during the life of *B.*, in trust for her separate use, with remainder to *A.* in fee. *A.* entered into a contract to sell the property to *C.*, who had notice of the provisions of the settlement; and in the contract it was stated that *A.* would "procure a proper assurance of the premises to the purchaser to be executed by all necessary parties." The purchase money was paid by *C.* to the trustees of the settlement, and by them invested pursuant to the contract; and a draft conveyance in the form of a joint appointment by *A.* and *B.* to *C.* was approved, but before executing it *A.* died suddenly. *B.* having after *A.'s* death refused to convey her life interest:—*Held*, that *C.* was entitled to specific performance to the extent of *A.'s* reversion in fee, with compensation in respect of *B.'s* life interest, and a lien on the invested purchase-money in the hands of the trustees of the settlement. Barker *v.* Cox 46

3. —— *Power of Sale—Trustee and Cestuis que Trust joining in Sale—Selling Trust Property with other Property—Apportionment of Purchase money.*] It is the duty of trustees who, having a trust or power to sell the trust property, join with the owner of another property in selling both properties together, first, to see that such a mode of sale is beneficial to their *cestuis que trust*; secondly, to see that their share of the purchase-money is apportioned before the completion of the purchase, and to obtain payment of such apportioned share; and thirdly, to apportion the share themselves, taking care to act under proper advice.—The proper mode of apportioning the prices of life estate and reversion when sold together for a lump sum, is to value both interests separately and not to put a value on one and deduct that from the total price. The circumstances under which trustees of one property may join with the owner of another in selling both properties together, considered.—Observations on *Rede* v. *Oakes* (4 D. J. & S. 505).—*Morris* v. *Debenham* (2 Ch. D. 540) approved of. *In re* Cooper and Allen's Sale to Harlech - - - 80

4. —— *Vendor's Lien.*] It was agreed between *A.* and a trustee for an intended company that as soon as the company was formed and had adopted the agreement, *A.* should sell and the company purchase *A.'s* interest in a leasehold brickfield and that on an assignment to the company being executed the company should pay him as the purchase-money £8000 in manner thereinafter mentioned, namely, £6000 in cash and £2000 in fully paid-up shares. The property was assigned to the company by a deed which stated the consideration to be £6000, to be paid to *A.* as thereinafter mentioned, viz., 50 per cent. on all sums of money to be received from sale of shares, and 50 per cent. on all moneys borrowed by the company by way of capital until the £6000 was paid. The company became abortive; no money was ever received by sale of shares, or borrowed, and ultimately the company was ordered to be wound up:—*Held* (affirming the decision of *Malins*, V.C.), that the nature of the contract was such as to exclude vendor's lien, and that *A.* had no lien on the leasehold premises. *In re* Brentwood Brick and Coal Company - - - - 56

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—— Agent of vendor—Collusion with purchaser
See Principal and Agent. [352
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VOLUNTARY SETTLEMENT — *Marriage Settlement by Widower and Widow—Limitation in favour of Widower's Son—Construction—Son a Volunteer—Agreement for Sale by Widower—Specific Performance.*] Under a marriage settlement the son by a former marriage of the intended husband took an interest in property brought into settlement by the husband:—*Held*, that the son was a volunteer, and that to the extent of his interest the settlement was void as against a subsequent purchaser from the husband.—*Clarke* v. *Wright* (6 H. & N. 849) commented upon. Price *v.* Jenkins - - - - - 483

2. —— *Post-nuptial Settlement supported against subsequent Purchaser for Value.*] Real estate having been devised to an unmarried woman with an expression of wish that, in case she should marry, she should before marrying settle the same estate for her own separate use for life, and to such uses as she should by will, and notwithstanding coverture, appoint, the devisee married, and about a year after the marriage, a child having been born, the husband and wife joined in a deed, acknowledged by the latter, purporting to be executed to give effect to the testator's wish, whereby the land was conveyed to trustees, upon trust for the wife for life, remainder for the husband for life, remainder to the children as the husband and wife should jointly by deed, or as the survivor should by deed or will appoint; and, in default, to the children absolutely; and if no children, to the wife in fee, if she survived the husband; if not, to the wife's brothers absolutely: —Subsequently the husband and wife, by acknowledged deed, mortgaged the property without notice of the settlement:—*Held*, that the settlement was for valuable consideration, and not void as against the mortgagee, under the statute of 27 Eliz. c. 4.—*Hewison* v. *Negus* (16 Beav. 594) followed. Teasdale *v.* Braithwaite - 85

WARRANTY—Implied, that a vein of coal exists
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WILL—*Construction*—"*Children of A. who shall be living at my Death, or who shall have died in my lifetime leaving Issue living at my Death*"—*Presumption of Gift to Issue—Gift to Class capable of taking—Lapse—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78).] A testator devised five freehold houses to "all and every the children of my late brother *J. C.* who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death in equal shares." By a codicil, after reciting that some of the children of his late brother *J. C.* had lately died without issue, the testator revoked his previous devise, and devised one of the houses to *A.*, and the remaining four in the same terms as the original devise.—Four children of *J. C.* were living at the testator's death, and one other child died

WILL—*continued.*
in the testator's lifetime leaving children living at the testator's death:—*Held*, that the four children who survived the testator took the whole property. —Where there is a gift by a testator to a class, the rule is that those members of the class who are at his death capable of taking, take the whole, the gift being construed as shewing an intention on the part of the testator that the class shall take so far as the law allows. *In re* Coleman and Jarrom - - - - - - 165

2. —— *Construction—Class—Death in Lifetime of Testator—Settlement of Share of Daughter.*] A testator made a general gift by will of his real and personal estate to trustees upon trusts for sale and conversion, and to hold the proceeds in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, the share of each of his sons to be for his own absolute use and benefit. And he directed that the share of each of his daughters should be held upon trusts in effect for herself for life for her separate use, and after her death for her children. The will contained provisions for substituting the issue of sons dying in the lifetime of the testator for the sons, but no similar provision for the case of daughters.—A daughter having died in testator's lifetime leaving children who survived him:—*Held*, that the gift of the daughter's share did not fail, and that her children were entitled.—*Stewart* v. *Jones* (3 De G. & J. 532) questioned. *In re* Speakman. Unsworth *v.* Speakman - - - - - - 620

3. —— *Construction*—"*Die without Issue*"—*Reference to Children.*] A testator gave a fund of £66,666 13*s.* 4*d.* consols to trustees, upon trust to pay £1000 a year to each of his two daughters for their lives, and after the death of each daughter he gave the sum of £33,333 6*s.* 8*d.* consols, which he described as the share of each daughter, unto and among all and every such child or children she might happen to leave at her decease, to be equally divided between them when and as they should respectively attain the age of twenty-one years, and if but one child, then to such only child; and in case either of his daughters should die without issue, he directed that the £33,333 6*s.* 8*d.* consols, being the share of her so dying, should be transferred by his trustee to such person or persons, and in such manner as she by her will and testament in writing duly executed might direct and appoint. There was a general residuary gift.—One of the daughters executed the power and died, having had one child, who died in her lifetime, leaving children who survived their grandmother;—*Held*, that the words "die without issue" meant such issue as were previously mentioned, and that the power was validly exercised. *In re* Merceron's Trusts. Davies *v.* Merceron - - 182

4. —— *Construction—Ejusdem Generis—General Bequest—Articles specifically enumerated.*] A testatrix made her will in these words: "I, *S. G.*, do bequeath to *A. G.* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to *H. G.*; the servants in the house who have been a year with me to receive £10, and clothes divided among them; also all kitchen utensils:—*Held*,

WILL—*continued.*

that the bequest was not limited to the articles specifically bequeathed, but that the will passed the whole of the personal estate of the testatrix. KING *v.* GEORGE - - - - 435

5. —— *Construction — Ejusdem Generis — "Money, Cattle, Farming Implements, &c." — Blank Gift—General Residuary Gift.*] A testator directed his freehold estate to be sold, and his debts to be paid by his widow, his sole executrix. He then bequeathed to her "all my money, cattle, farming implements, &c., she paying my brother *J. C.* the sum of , and my brother *L. C.* the sum of ":—*Held*, that the widow was entitled to the whole of the testator's property after payment of his debts, and funeral and testamentary expenses. CHAPMAN *v.* CHAPMAN - - 800

6. —— *Construction — Executor — Gift to, in that Character.*] Bequest of £100, after the death of tenant for life, to *P.*, who was named as one of the trustees and executors, but renounced and disclaimed:—*Held*, that the presumption that it was given to him in his character of executor was rebutted by the fact of its being payable after the death of the tenant for life, and that he was entitled to the legacy. *In re* REEVE'S TRUSTS 841

7. —— *Construction — "Executors or Executrix"—Beneficial Interest.*] A testatrix gave £100 to the "executors or executrix" of *C.* *C.* left an executor and two executrixes, who all predeceased the testatrix:—*Held*, a gift to *C.'s* legal personal representatives as part of his estate. TRETHEWY *v.* HELYAR - - - - - 53

8. —— *Construction — Foreign Bonds — Colonial Bonds not included.*] Bequest by a testatrix of "the foreign bonds, amounting to about £8000," which she had purchased:—*Held*, that colonial bonds which formed part of the amount mentioned did not pass. HULL *v.* HILL - - 97

9. —— *Construction—Mistake—Devise of Real Estate—Misdescription—Intestacy.*] Testator devised his freehold property at *M.* in trust for his children, a son and daughter, equally. He had no freehold property at *M.*, but he had two undivided fourth shares of some in *R.*, which *M.* adjoined, and in which parish it was situate:—*Held*, that the property in *R.* descended to the heir-at-law. BARBER *v.* WOOD - - 885

10. —— *Construction—Mistake—Gift to Specified Number of Children—Presumption as to Children intended.*] In the case of a testamentary gift to children describing them as consisting of a specified number which is less than the number in existence at the date of the will, the Court rejects the specified number on the presumption of mistake, and all the children in existence at the date of the will are held entitled, unless it can be inferred who are the particular children intended, in which case the Court holds those children entitled to the exclusion of the others.—Testatrix, by will made in 1873, bequeathed "to each of the three children of Mrs. *W.*, widow of *W. W.*, one hundred pounds." *W. W.*, brother of the testatrix, died in 1857, leaving a widow and three children, of whom one died in 1870, and two survived. Mrs. *W.* married again in 1858, and had six children by that marriage living at the date of the will. The evidence shewed that the testatrix knew of the

WILL—*continued.*

second marriage, and that there were children of that marriage, but that she did not know their number; also that she had not seen Mrs. *W.* for six years before the date of her will:—*Held*, that the two children by *W. W.* were alone entitled, and not the children of the second marriage. NEWMAN *v.* PIERCEY - - - - 41

11. —— *Construction — Mortgaged Estate — Mortgagee Trustee — Residuary Gift—Charge of Debts and Legacies.*] A testator, who was mortgagee in fee of an estate to secure a sum of money of which he was trustee, devised and bequeathed his residuary real and personal estate unto and to the use of his wife, her heirs, executors, administrators and assigns, in trust, either to leave the same in existing investments, or sell and convert the same, and out of the proceeds to pay his debts, funeral and testamentary expenses, and certain legacies, and invest the residue and retain the income thereof for her life; and subject as aforesaid, such residue to remain in trust for *C.* There was no express devise of trust or mortgaged estates:—*Held*, that the legal estate in the mortgaged property did not pass under the will.—*Quære*, whether the legal estate would have passed, had the mortgage money belonged to the testator in his own right. *In re* SMITH'S ESTATE - - 70

12. —— *Construction—Period of Distribution —Surviving.*] A testator gave a sum of stock to trustees, the interest to be paid to *A.* for life, and after his death the capital to be divided amongst the children of testator's late daughter *B.*, or their descendants, but should there be none of them surviving, then the capital to be equally divided amongst such other grandchildren as he might then have living, or in default thereof to his legal representative. *B.* had seven children, three of whom died without children in the lifetime of the testator; of the remaining four one alone survived, *A.*, the tenant for life; three died before *A.*, and only one of these three left issue:—*Held*, that the words "should there be none of them surviving" referred to the testator's death, and that the children of *B.* who survived the testator took vested interests. *In re* DAWES' TRUSTS - 210

13. —— *Construction—Power of Sale of Real Estate—Tenant for Life—Whether co-Trustees and co-Executors surviving the Tenant for Life can sell.*] Testator, after stating that he was desirous that a farm which he occupied should be carried on during the life of his wife for the maintenance, support, and benefit of herself and all his children, and that upon her death all his property both real and personal should be "fairly and equally divided" among "all" his children, and that the property which his three children by a former marriage had derived should be brought into hotchpot from the time of his decease, "so as to form one common fund," appointed his wife "and her two brothers, *W. C.* and *R. C.*, trustees and executors" of that his will; and for the purpose of management authorized and empowered them to sell and convert into money all or any part of his said real and personal estates, or to mortgage or let the same or any part thereof, and invest the proceeds as therein mentioned. Testator directed and empowered his "said trustees and executors" to carry on the farm "by and out of" his assets

WILL—*continued.*

"for the maintenance, support, and benefit of" his wife and children; and subject thereto declared that his real and personal estate, "and the proceeds thereof" should be held in trust for all his aforesaid children, in equal shares; the personal property to which the children by his first marriage had become entitled being brought into hotchpot, to be vested interests at twenty-one, or on death under that age leaving lawful issue:—*Held*, that upon the death of the widow the surviving trustees and executors had power to sell and convey the real estate without the concurrence of the children. *In re* COOKES' CONTRACT - 454

14. —— *Construction—Precatory Trust—Bequest to Wife—"To do justice" to Testator's "Relations."*] A testator bequeathed all his furniture, &c., and other property to his wife, and for her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who" she "may please":—*Held*, on demurrer, that no precatory trust was created. *In re* BOND. COLE *v.* HAWES - - - - - 238

15. —— *Construction—Shifting Use—Eldest Son.*] *E.* by his will, dated in 1814, devised real estate to *R.*, the second son of Sir *T. S.*, of *H.*, Baronet, for life, with remainder to *R.*'s first and and other sons successively in tail male, with like remainders in favour of *J.* and *C.*, the third and fourth sons of Sir *T. S.*, and their sons, with an ultimate remainder to the testator's right heirs. The will contained a name and arms clause, and also a proviso that in case *R.*, *J.*, or *C.* should become the eldest son of Sir *T. S.*, the estate thereinbefore devised to him becoming the eldest son of Sir *T. S.*, and the remainder to his first and other sons, should cease, determine, and become void, as if he were actually dead without issue male of his body, and the real estate thereby devised should immediately go and remain to the use of such person or persons as by virtue of the devises thereinbefore contained would then be entitled as the person or persons next in remainder to the same estates, in case such person so becoming the eldest son of Sir *T. S.* were then dead without issue male of his body. Sir *T. S.* survived the testator. His eldest son died without issue in 1863. *R.*, who thereupon succeeded to the baronetcy, died without issue in 1875. *C.* died without issue in 1834:—*Held*, by the Master of the Rolls, that as "eldest son" could not in this will mean the eldest born son, it must be taken to mean eldest surviving son for the time being—that *J.* had become the eldest son of Sir *T. S.* within the meaning of the will, and that the estate had devolved on the heir of the testator.—*Held*, by *James*, L.J., and *Baggallay*, J.A. (*dissentiente Bramwell*, J.A.), that "become the eldest son of *T. S.*" meant "become in the lifetime of Sir *T. S.* his eldest surviving son and heir apparent," and that the shifting clause had not taken effect. HERVEY-BATHURST *v.* STANLEY. CRAVEN *v.* STANLEY - - - 251

16. —— *Construction—Trustees' Discretion—Direction to pay Income for Maintenance and Support of Son's Wife—Separate Estate—Marital Right of Second Husband.*] Testator gave his property to trustees on trust during the life of his son to pay, apply, and dispose of the annual produce of a certain portion of it for the maintenance and support of his son and his present or any future wife, and the maintenance, education, and support of their children, or any or either of them his son and his wife and children, in such manner and such proportions as the trustees should in their discretion think fit and proper, without being answerable or accountable to any person for the way in which they should apply the same; and, after the decease of his son, to pay and apply the annual proceeds in like manner unto and for the benefit of any widow for life, and any children until they should attain twenty-one or marry, and subject to those trusts in trust for the children. The son died in 1849, leaving a wife and six children, the youngest of whom attained twenty-one in 1870. In 1851 the widow married again. The settlement made on the marriage did not comprise the above annual proceeds, and the trustees continued to pay them to the wife as part of her separate estate and on her separate receipt. The second husband, who was living apart from his wife, claimed to be entitled to the income during her life:—*Held*, that the trustees had a discretion to pay the wife the income for her separate use. AUSTIN *v.* AUSTIN. AUSTIN *v.* BOYCE - - - - - - 233

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